TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. [redacted]49.

THE RIO GRANDE DAM AND IRRIGATION COMPANY AND THE RIO GRANDE IRRIGATION AND LAND COMPANY, LIMITED, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED JANUARY 6, 1908.

(20,959.)

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1 Be it remembered, that heretofore, on, to wit, *on* the twentieth day of December, A. D. 1904, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a transcript of the record in a certain cause entitled The United States of America *vs.* The Rio Grande Dam & Irrigation Company *et al.*, appellants, which said cause was docketed in the said Supreme Court as No. 1075, which transcript of record was and is in words and figures following to wit:

2–4 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1905.

No. 1075.

THE UNITED STATES OF AMERICA, Appellee,
vs.
RIO GRANDE DAM & IRRIGATION COMPANY ET AL., Appellants.

Appeal from District Court, Third Judicial District.

Transcript of Record.

Klock & Owen, Attorneys for Appellant.
W. B. Childers, United States Attorney for appellee.

5 UNITED STATES OF AMERICA,
Third Judicial District, Territory of New Mexico:

Be it remembered, that on the 24th day of May, A. D. 1897, there was filed in the office of the Clerk of the United States Court of the Third Judicial District of the Territory of New Mexico, a Bill of Complaint, which said Bill of Complaint, is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA,
Territory of New Mexico:

In the District Court of the Third Judicial District of the Territory of New Mexico, for the Trial of Causes Arising Under the Laws of the United States.

To the Honorable Gideon D. Bantz, Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the Third Judicial District Court thereof:

The United States of America, by Joseph McKenna, their attorney general, and William B. Childers, United States Attorney for the Territory of New Mexico, bring this their bill of complaint against the Rio Grande Dam & Irrigation Company, a corporation duly

organized under and in pursuance of the laws of the Territory of New Mexico, and having its principal place of business in the town of Las Cruces, County of Dona Ana in said Territory;

And thereupon your orators, complaining say that the defendant, the said Rio Grande Dam & Irrigation Company had and has for the objects and purposes *and* its incorporation the construction and maintenance of dams and reservoirs, and canals, ditches and pipe-lines to the extent from fifty miles to five thousand miles in the Territory of New Mexico; and for the purpose of supplying water to be accumulated in practically illimitable quantity in said dams and reservoirs, canals, ditches and pipe-lines, it was and is the object and purpose of the said defendant Company to construct and build dams across the Rio Grande river in the Territory of New Mexico at such certain points in the said River in said Territory, that may be necessary, to carry out the objects and purposes of said incorpora-
6 tion.

2. Your orators show that section 10 of the Act of Congress of September 19th, 1890, (26 Stat. 454.) is as follows: to-wit:

"That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect to which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and w-arves and similar structures, erected for business *b*urposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court, the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States."

And that Section 3 of the Act approved July 13, 1892 (27 Stat. 110) is as follows, to-wit:

"That *is* shall not be lawful to *be* build any w-arf, pier, dolphin, boom, dam, weir, break-water, bulkhead, jetty or structure of any kind outside of established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; it shall not be lawful hereafter to commence the construction of any bridge, bridgedraw, bridge piers and abutments, causeway, or other works over or in any port,

road, roadstead, haven, harbor navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge, or enclosure within the limits of any breakwater, or of the chan-el of any navigable water of the United States, unless approved and authorized by the Secretary of War; Provided, that this section shall not apply to any bridge, bridgedraw, bridge piers and abutments, the construction of which has heretofore be- duly authorized by law, or be so construed as to authorize the construction of any bridge, drawbridge, bridge piers and abutments, or other works under the act of the legislature of any State over or in any stream, port, road-stead, haven or harbor or other navigable water not wholly within the limits of such State."

3. Your orators further show and complain, that the said defendant Company, are particularly and immediately about to commence and to create, and intend and threaten, to commence and create, an unlawful obstruction in the said Rio Grande river by constructing a dam in and across said river at a point called Elephant Butte, in the Territory of New Mexico and in the Third Judicial Dis-
7 trict thereof, the same being one hundred and twenty-five miles north and slightly west of the City of El Paso, in the State of Texas, for the purpose of storing water in a large quantity to carry out the purposes of said incorporation, as before in this bill mentioned.

4. Your orators further show, that the said Rio Grande river, from and including the site of the proposed said dam and construction by the said defendant company, has been used to float logs for commercial and business purposes and for af-ording a means for commercial traffic within and between the Territory of New Mexico and the State of Texas, in the United States of America, and the Republic of Mexico; that the first material addition to the volume of water of the said Rio Grande River is at a point three hundred and twenty-five miles below the site of the said proposed dam and construction by said defendant company, where the Rio de los Conchos, or Conchos River, empties into the said Rio Grande River; and that the said Rio Grande River is a navigable stream and used as such in interstate commerce, from the mouth of said Conchos River, in the Republic of Mexico, to the City of El Paso, State of Texas, in the United States of America, a distance of two hundred miles.

5. And further, that the navigability of the said Rio Grande River at the City of El Paso aforesaid, has been recognized and acknowledged heretofore by the Congress of the United States and Secretary of War of the United States.

6. And further, that the said Rio Grande River, from the City of El Paso aforesaid up to and beyond the site of the dam proposed and threatened to be commenced and constructed by the said defendant Company, as aforesaid, carry the greater quantity of water than it carries at the said City of El Paso, and by reason of the conformation of the bed and banks, and the channel thereof, makes

navigation of such last mentioned portion of said river a feasible accomplishment.

7. And further, that such proposed dam will be such a one as will check the flow of water in the said Rio Grande River at the said point of Elephant Butte entirely for a greater portion,
8 if not the entire year, and impound it; and that such distribution of the waters of said river from within said proposed dam at said Elephant Butte as contemplated, intended, threatened, and about to be attempted, commenced, begun and created, and constructed by said defendant company, as aforesaid, will practically destroy the said river as a stream for many miles below said point at said Elephant Butte, and the volume of the water below said proposed dam so deminished by the construction and uses thereof as aforesaid, as to materially affect the navigability of said Rio Grande River, and impair navigation and commerce throughout its entire course from said proposed dam at Elephant Butte to the Gulf of Mexico.

8. And further, that a creation of an obstruction to the navigable capacity of said river, by the building of said proposed dam, as above described, by the defendant company, is not affirmatively authorised by law, nor has any such authorization been given.

9. And further, that the proposed building and construction of the said proposed dam by said defendant Company is without the permission, authority or approval of the Secretary of War of the United States.

10. Your orators complaining, show further, that the said defendant company, by means in part of said dam, to be constructed as aforesaid, proposes to create the largest artificial lake in the world, to obtain control of the entire flow of the Rio Grande River in the southern part of the Territory of New Mexico, hereinbefore described, the same being the only practical river for irrigating said portion of said Territory; by control-ing said river, as aforesaid, to control to a great extent the irrigable land adjacent thereto in said district and country; to subject the owners of irrigable lands therein to a perpetual water rent; to obtain possession, by means of the practically exclusive power of water-rights in a partially arid region of the United States, of large tracts of irrigable land in said portion of said Territory to secure a monop-ly of all the water suitable for irrigation in said Territory contiguous to the said river below the site of said proposed dam.

Your orators therefore pray, that the said defendant may
9 be compelled to answer all and singular, the premises in this bill (but not un-er oath, the answer under oath being hereby expressly waived).

And that the defendant, the Rio Grande Dam & Irrigation Company may be restrained from beginning, commencing and attempting, building, constructing, creating or maintaining any dam, breakwater, weir, structure or obstruction of any character whatsoever across the Rio Grande River in the waters thereof, in the Territory of New Mexico, and especially at Elephant Butte, or at any point thereon in said Judicial District, or in any manner to begin the construction of, or to contract or create any structure, dam, or

other obstruction of any character whatsoever, in such manner and to such extent as shall affect the navigable capacity of said Rio Grande river in said Territory of New Mexico, Your orators pray, that your Honor may grant a writ of injunction, issuing out of and under the seal of this honorable court perpetually enjoining and restraining the said defendant, The Rio Grande Dam & Irrigation Company, its employees and agents, or any one under its authority, for or by them, from any or further creating, constructing, or maintaining or beginning the construction of any obstruction to the navigability of the waters of said river by any of the means in this bill and in this section hereinbefore set forth.

And your orators further pray, that a provisional or preliminary injunction be issued, restraining the said defendant, The Rio Grande Dam & Irrigation Company, from the beginning, commencing, attempting, building, creating, obstructing or maintain-g any obstruction to the navigability of said waters of and across the said Rio Grande river, and in the said waters thereof, in said Territory, by any of the means heretofore mentioned in this bill, to-wit, by means of a dam, breakwater, weir, piles, structure or other obstruction.

And for such other and further relief as to the cir*d*umstances, nature and equity of the case may require, and to your Honor shall seem meet.

Wherefore, that your Honor will grant unto your orators, the writ of subpœna in chancery issuing out and of and under the seal of this Court, to be directed to the said The Rio Grande Dam and Irrigation Company, commanding it to appear on Monday the 7th day of June, A. D. 1897, before your Honor, in the Court aforesaid, then and there to show cause, if any it have, why a perpetual injunction should not be issued against it in this behalf as prayed for in this bill, and then and there answer the premises and abide the order and decree of the Court.

JOSEPH McKENNA,
Attorney-General of the United States.

By direction of the Attorney-General.

(Signed) W. B. CHILDERS,
United States Attorney for New Mexico.

(Signed) GEO. P. MONEY,
Assistant United States Attorney for New Mexico.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

I have read the foregoing petition, by me subscribed, and the facts stated therein are true to the best of my information and belief.

(Signed) GEO. P. MONEY,
Assistant United States Attorney for New Mexico.

Subscribed and sworn to before me this the 22nd day of May, A. D. 1897.

[SEAL.] (Signed) E. L. MEDLER,
Notary Public.

Upon the filing and reading of the bill of complaint, in the foregoing cause, it is ordered that a temporary writ of injunction issue against the defendant, The Rio Grande Dam & Irrigation Company, as prayed for in said bill, and it is further ordered that said defendant show cause, if any it have, before me in Chambers, on Monday the 14th day of June, 1897, why said injunction should not be continued in force until the final hearing of the cause, or should be dissolved.

(Signed) GIDEON D. BANTZ, *Judge.*

Done in Chambers, this the 24th day of May, A. D. 1897.

Which Bill of Complaint is endorsed in words and figures as follows to-wit:

No. 140. No. 1243. United States of America, Territory of New Mexico, Third Judicial District. United States *vs.* The Rio
11 Grande Dam & Irrigation Company. Bill of Complaint. Filed in my office, May 24, 1897. W. B. Walton, Clerk. Joseph McKenna, Att'y General. William B. Childers, United States Attorney. Geo. P. Money, Ass't U. S. Att'y.

And thereafter, on the 21st day of June, A. D. 1897, there was filed in the office of the Clerk of the said Court, an Amended Bill of Complaint, which is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA,
Territory of New Mexico:

In the District Court of the Third Judicial District of the Territory of New Mexico, for the Trial of Causes Arising Under the Laws of the United States.

To the Honorable Gideon D. Bantz, Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the Third Judicial District Court thereof:

The United States of America, by Joseph McKenna, their Attorney General, and William B. Childers, United States Attorney for the Territory of New Mexico, bring this their amended bill of complaint, by leave of the Court, against the Rio Grande Dam and Irrigation Company, a corporation duly organized under and in pursuance of the laws of the Territory of New Mexico, and having its principal place of business in the town of Las Cruces, County of Dona Ana in said Territory; and the Rio Grande Irrigation and Land Company, Limited, a corporation organized under and by virtue of the laws of Great Britain, having its principal office in the City of London, England, and also being engaged in doing business in the said Territory of New Mexico. Thereupon the complainant alleges and says that the original defendant, the said Rio Grande Dam and Irrigation Company, is incorporated under the laws of the Territory of New Mexico, and has for the object

and purposes of its incorporation as such *has* proposed the
12 construction and maintenance of dams, reservoirs, ditches, canals and pipe lines.

2. The complainant further alleges, as it is informed and believe*d*, that the said original defendant intends and gives out, that it will construct from fifty to five thousand miles of canals, ditches, and pipe lines in said Territory of New Mexico, State of Texas, and Republic of Mexico, as set forth in its articles of incorporation, and that in pursuance of the purposes of incorporation it gives out that it is about to construct dams across the Rio Grande in the Territory of New Mexico at such certain points in said river in said Territory as may be necessary to carry out the said objects and purposes of this incorporation and proposes to accumulate and impound water from said river in unlimited quantities in said dams and reservoirs, and distribute the same through said canals, ditches and pipe lines.

3. The complainant further alleges that it is informed and believes, that the defendant, the Rio Grande Irrigation and Land Company, Limited, was organized under the laws of Great Britain as an adjunct and agent of the original defendant, the Rio Grande Dam and Irrigation Company, and for the purpose of securing capital for promoting the construction of said dams, reservoirs, canals, ditches and pipe lines, and that the said original defendant, the Rio Grande Dam and Irrigation Company, has entered into a contract or agreement for the conveyance to its co-defendant hereinafter designated as the English Company of some rights in and to said dams, reservoirs, canals, ditches and pipe lines to be constructed as aforesaid, or for the conveyance of their rights in and to said dams, reservoirs, ditches, canals and pipe lines, the exact language and purport and legal effect of which said contracts, agreement or conveyances are unknown to complainant. The complainant further alleges that it is informed that the same is of record in the office of the Probate Clerk, *Ex-officio* Recorder of the County of Sierra and Territory of New Mexico, a copy of which it asks leave to file*d* herewith and make a part of this amended bill, as soon as the same can be procured, to be marked "Exhibit A."

4. The complainant further alleges, upon information and
13 belief, that the said defendant, The Rio Grande Irrigation and Land Company, Limited, as agent, lessee, assignee, or under whatever relation may exist between it and the said original defendant, as hereinbefore alleged, has attempted to exercise and has claimed the right to exercise, all the rights, privileges and franchises of the said original defendant, and has given out as its object as said agent, lessee, or assignee, as aforesaid, to construct said dams, reservoirs, ditches and pipe lines and take and impound the water of said river, and thereby to create the largest artificial lake in the world and to obtain control of the entire flow of the said Rio Grande and divert and use the same for the purposes of irrigating large bodies of land, and to supply water for cities and towns, and for domestic and municipal purposes and for milling and mechanical power.

5. The complainant further alleges that the Rio Grande receives no addition to its volume of water between the projected dam and the mouth of the Conchos River, about three hundred miles below, and that the said Rio Grande, from the point of said projected dam to the mouth of the Concho River, throughout almost its entire course from the latter part to its mouth, flows through a exceedingly porous soil and that the atmosphere of the section of the country through which said river flows, from the point above the dam to the Gulf of Mexico, is so dry that the evaporation proceeds with great rapidity and that the impounding of the waters will greatly increase the evaporation, and that from these causes but little water, after it is distributed over the surface of the earth, would be returned to the river.

6. The complainant further alleges that the said river is navigable and has been navigated by steam boats up to the town of Roma, in the State of Texas, about three hundred and fifty miles from its mouth, and is susceptible of navigation and has been navigated above Roma to a point about one hundred and fifty miles below El Paso in the State of Texas. The complainant further alleges that the navigability of said river is interfered with at the last mentioned point by some falls or rapids, and that the said river above said
14 falls or rapids is susceptible of navigation up to La Joya in the Territory of New Mexico, about one hundred miles above Elephant Butte, where the defendants propose to construct said dam; and said complainant further alleges that the said river between said rapids and said town of La Joya, has at different times been used for the purposes of floating and transporting rafts, logs and poles, and that the said portion of said stream is susceptible of being used and navigated for commercial purposes, and the complainant further alleges that the said river is navigable and susceptible of being navigated as aforesaid, for carrying on commerce between the Territory of New Mexico, the State of Texas and the Republic of Mexico.

7. The complainant further alleges that the impounding of the waters of said river by the construction of said dam and reservoir at said point called Elephant Butte, about one hundred and twenty-five miles above the city of El Paso, said point being in the Territory of New Mexico, and the diversion of the said waters and the use of the same for the purposes hereinbefore mentioned will so deplete and prevent the flow of the water through the channel of said river below said dam, when so constructed, as to seriously obstruct the navigable capacity of the said river throughout its entire course from said point at Elephant Butte to its mouth.

8. Complainant further alleges that the construction of said dam has never been affirmatively authorized by law, and the plans and specifications for the construction of the same have not been submitted to the Secretary of War for his approval, and the location and plans have not been submitted and approved by him; and the complainant further alleges that no dam or other obstruction to the navigable capacity of any waters can be lawfully constructed until the same have first been affirmatively authorized by law and until

the location and plans for such obstruction, have been submitted and approved by the Secretary of War.

9. The complainant further alleges that the navigability of the said Rio Grande at the City of El Paso, State of Texas, has been recognized and acknowledged by the Congress of the United States and the Secretary of War of the United States.

15 The complainant further alleges that by Treaty, the Government of the United States of America and the Republic of Mexico, have, by Treaty stipulation, agreed and declared that the Rio Grande, from the Southern boundary of the Territory of New Mexico to its mouth, shall be free and common to the vessels and citizens of both countries, and that neither country shall without the consent of the other construct any work that may impede or interrupt in whole or in part, the exercise of said right of free navigation, and that neither party of said Treaty have consented or authorized the construction of said dam.

Complainant files herewith the articles of incorporation of said original defendant as a part of this bill of complaint marked Exhibit B.

Wherefore the complainant being remediless except in a Court of equity, where such matters are remedial, the complainant prays that a subpœna in chancery be directed to said defendant, the Rio Grande Dam and Irrigation Company and the Rio Grande Irrigation and Land Company Limited, requiring them to be and appear before this Honorable Court at a time and place to be therein named, to answer all and singular the premises but not under oath (answers under oath being hereby expressly waived).

And that the said defendants, the Rio Grande Dam and Irrigation Company and the Rio Grande Irrigation and Land Company, Limited, may be restrained from beginning and commencing or attempting to construct or build said dam and reservoir or any other dam, break-water, reservoir or other structure or obstruction of any character whatsoever across the Rio Grande or the waters thereof, or from maintaining such dam or obstruction in the Territory of New Mexico, and especially at Elephant Butte in said Territory or any other point on said river in said Territory of New Mexico, as shall effect the navigable capacity of said Rio Grande at any point throughout its course, whether in the Territory of New Mexico or elsewhere. And that the temporary injunction heretofore granted against said original defendant be continued.

And the complainant prays that it shall have such other and further relief in the premises as equity may require and to Your Honor shall seem meet.

16 The complainant further prays that a temporary injunction be issued and directed to the said defendants, the Rio Grande Dam and Irrigation Company, and the Rio Grande Irrigation and Land Company, Limited, restraining and enjoining them, and each of them from beginning, commencing and attempting to construct or build said dam and reservoir or any other dam, break-water, reservoir or any other structure or obstruction of any character whatsoever across the Rio Grande or the waters thereof or from

maintaining such dam or obstruction in the Territory of New Mexico, and Especially at Elephant Butte in said Territory, or any other point on the line of said river in said Territory of New Mexico, as shall affect the navigable capacity of said Rio Grande, *at* the further orders of this Honorable Court, and that upon the final hearing of this cause that said injunction shall be perpetual.

(Signed) JOSEPH McKENNA,
Attorney General of the United States.

(Signed) WM. B. CHILDERS,
United States Attorney for the Territory of New Mexico.

In the District Court of the Third Judicial District of the Territory of New Mexico.

No. —.

UNITED STATES OF AMERICA, Complainant,
vs.
THE RIO GRANDE DAM & IRRIGATION COMPANY ET AL., Defendants.

Affidavit of W. B. Childers, U. S. Att'y.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

William B. Childers, of lawful age, being duly sworn, upon oath deposes and says: That he is the United States Attorney for the Territory of New Mexico; that under instructions from the Attorney General of the United States he communicated by letter with the defendant, the Rio Grande Dam and Irrigation Company, at Las Cruces, New Mexico, stating to them that he, affiant, had been instructed to prevent said Company from erecting a dam across the Rio Grande at a place called Elephant Buttes in the Territory of
17 New Mexico, about one hundred and twenty-five miles above El Paso, and that it had been reported that said Company was about to commence work and requested an answer to his communication. A few days afterwards the defendant company wired affiant that it did propose to commence the erection of said dam at said point. Thereupon affiant instructed George P. Money, Assistant United States Attorney to file suit to enjoin the construction of said dam and reservoir; whereupon the original bill in this cause was filed. Affiant further says, that he is officially informed and believes that the erection of said dam and reservoir has not been authorized by the Secretary of War and that the same is not affirmatively authorized by law.

Affiant further states, that from his knowledge of geography and information acquired from books of reference and official reports made by officials of the Government of the United States, that the said Rio Grande is a navigable stream for a considerable distance above its mouth, and therefore states positively that such is the fact.

Affiant further states, that from documentary evidence on file in the Department of State at Washington, copies of which have been furnished him, that the said River is susceptible of navigation and has been navigated to a point about one hundred and fifty miles below El Paso in the State of Texas, as alleged in the amended bill of complaint filed in this issue. Affiant further states, that he has been reliably informed and believes that said river has been used above said point in the past for the purpose of floating logs down the stream to the City of El Paso, and that he is also informed and believes that said river has been recently so used for floating telegraph poles for a short distance a little below the town of La Joya, which is situated on said river in the County of Socorro, New Mexico.

Affiant further states, that from an examination of the reports of W. W. Follett, Engineer of the International Water Boundary Commission, organized pursuant to treaty between the Government of the United States and the Republic of Mexico, that the amount of water in said river has been greatly depleted and diminished within the past ten or twelve years by reason of the diversion for the
18 purposes of irrigation by ditches and otherwise of large amounts of water in Colorado and New Mexico above the point where the said defendant Company proposes to construct the said dam; that said depletion and diminution has seriously effected the navigable capacity of the said river at said point called Elephant Buttes and below there.

Affiant further states, that upon the hearing of the rule to show cause why the temporary injunction issued in this cause should not be continued, he will present in support of this affidavit, the original or copies properly certified, of the documents above referred to, together with others to sustain the allegations made upon information and belief in this cause.

Affiant further says, that from an examination of the certified copies of the articles of incorporation of said Rio Grande Dam and Irrigation Company, which said certified copy he proposes to present upon said hearing, he is informed and believes that the purposes of the said defendant Company, are to construct said dam and a line of ditches and canals and pipe lines, to begin at the dam or dams to be built by said Company across the Rio Grande river at a place or various and several places within Township thirteen (13) and fourteen (14) and Ranges three (3) and four (4) west in Sierra County, New Mexico, and to terminate at any point or place and various and several places, in the Territory of New Mexico, State of Texas and Republic of Mexico, to which it may be practicable to carry the waters so accumulated, and that the length of said canals and ditches to be from fifty miles to five thousand miles.

Affiant further states, That the Rio Grande Irrigation and Land Company, Limited, made a co-defendant by the amended bill filed in this case, as he is informed and believes, has the contract relation set up and alleged in the amended bill filed in this case with the said original defendant, the Rio Grande Dam and Irrigation Company, and was organized for the purpose of construction or promoting the construction of said improvements above described, either by actually

constructing the same or by raising the necessary capital therefor; and that said Company, according to the prospectus issued by
19 it, was formed to acquire by lease and assignment, the franchises, rights water-rights and right to appropriate the waters of the Rio Grande, contracts, purposes and undertakings of the said defendant, the Rio Grande Dam and Irrigation Company, and for the purpose of irrigation, colonizing and improving the lands in the Rio Grande Valley between Engle, New Mexico, and Fort Quitman, Texas, and affiant files herewith and makes a part of this affidavit a copy of the prospectus issued by said defendant, the Rio Grande Irrigation and Land Company, Limited.

Affiant further states, that by the terms of an act of Congress passed on the 6th day of September, A. D. 1888, and of an Act of Congress approved July 28th, 1882, the Rio Grande was treated and recognized as a navigable stream at the City of El Paso in the State of Texas, and so treats it, and has requested the Department of Justice to take such proceedings as may be necessary to prevent the construction of said dam and reservoir.

(Signed) WILLIAM B. CHILDERS.

Subscribed and sworn to before me this 19th day of June, A. D. 1897.

[SEAL.] (Signed) E. L. MEDLER,
Notary Public, Bernalillo County, New Mexico.

Which amended Bill of Complaint is endorsed in words and figures as follows, to-wit:

No. 140. No. 1243. In the District Court Third Judicial District Territory of New Mexico. United States *vs.* The Rio Grande Dam and Irrigation Company, *et al.* Amended Bill of Complaint. Filed in my office Jun- 21 1897. W. B. Walton, Clerk, by H. B. Holt, Dep. W. B. Childers, United States Attorney.

20 And thereafter, on the 25th day of June, A. D. 1897, there was file- in the office of the Clerk of said Court, an Affidavit of Anson Mills, on behalf of Compts., which is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico.

No. —.

UNITED STATES OF AMERICA, Complainant,
vs.
THE RIO GRANDE DAM AND IRRIGATION COMPANY ET AL., Defendants.

Affidavit of Anson Mills, Brigadier General, United States Army, Boundary Commissioner.

STATE OF TEXAS,
County of El Paso, ss:

Anson Mills of lawful age, being duly sworn, upon oath deposeand says: That he is a Brigadier General in the United States Army, and has been for the past four years on special duty as Mexican Boundary Commissioner, having in addition to that duty, in charge, together with the Mexican Commissioner, the study of a feasible project for the equitable distribution of the waters of the Rio Grande to all persons residing on its banks or tributaries, having equitable interests therein. That for several years in the past—nearly forty years—he resided in El Paso, Texas, and was engaged as an engineer and surveyor in this vicinity, surveying lands in Texas abutting on the Rio Grande. That eight years ago he was for twelve months engaged in the preliminary investigation, by order of the Department of the Interior, for an international dam, projected near this city. That for these reasons, and a general study of the regimen of the Rio Grande, he states with greater confidence than he otherwise would, his knowledge of the questions submitted to the United States District Court in the Third Judicial District of the Territory of New Mexico, in an amended bill, prepared by United States Attorney Childers, which he has read and is familiar with.

Affiant further states that from his own personal knowledge
21 the Rio Grande is now navigated by steam from Brownsville, Texas, to Camargo, Tamaulipas opposite Rio Grande City, Texas, a distance of about two hundred and fifty miles by the River's course, and from information and belief he states it to have been in former years navigated by steam as far as Roma, a distance of about three hundred miles by the river's course from Brownsville, Texas. That the latter information was obtained from Major W. H. Emory's (United States Boundary Commissioner) official report of his survey of the boundary line in 1852 to 1855, and from the verbal statements of Captain Kelly of Brownsville, Texas, who has been in the steamboat business for over thirty years, and who stated to affiant that at the time of the Maximilian war he had thirty steamboats in his service, operating between Brownsville, Texas, and Camargo, Tamaulipas, and that at that same period, The United States Gov-

ernment had many additional vessels engaged in the same business, as well as several gun boats plying on the river, but at this date, his fleet has been reduced to one small vessel, the "Steamer Bessie," and that said Captain Kelly informed him by reason of the depletion of the depth of the channel of the Rio Grande, that it was not very difficult *fro* him to navigate this small vessel with very light draft.

And affiant further states that from information and belief, that the river has been navigated by sail boats, flat boats and small boats above Roma, Texas, to a point about one hundred and fifty miles below Presidio del Norte, Texas, that he obtained this information from the aforesaid Major Emory's report, wherein it is stated that he procured a number of small boats built in San Antonio, Texas, and carried them to a point about one hundred miles above the mouth of Devil's river, and that his engineers used them for taking the topography of the country and surveying the boundary line; and from a report of Captain Love, in the employ of the Quartermaster's Department of the United States Army, who claims to have carried a small boat up the river to within one hundred and fifty miles below El Paso, Texas, but affiant believes that he was mistaken in the point described, as in those days El Paso was known as El Paso del Norte, and Presidio as Presidio del Norte, and affiant
22 is of the opinion that he had Presidio del Norte in view in his report instead of El Paso del Norte, as written. Affiant further states that in 1858 he, with a party constructed and floated a raft of logs from a point known as El Canutillo above El Paso, Texas, down to El Paso, for building purposes and that he is informed and believes that the same has been done by many other parties about that time, the names of who- he is now unable to remember; and that recently a party constructing the Postal Telegraph Company's line, used the river's current for floating their telegraph poles down the river at a point near La Joya, New Mexico.

Affiant further states that in past years—namely forty years ago—there was comparatively an abundance of water in the river, and that it seldom went dry (about only on-e in seven years) and then for a very short period, generally about the month of August or September. That in later years the waters have been much depleted during the summer and fall but the flood waters of the spring are still great and last from one to two months, during which period they are susceptible of carrying small boats, flat boats, rafts and logs. At times—periodically each year—the volume of water is so great that steam boats could navigate it for hundreds of miles both above and below El Paso, Texas.

Affiant further states that he has been engaged under the Geological survey, in taking the flow of the river for a full year at El Paso, Texas and has had access to the gaugings of the flow of the Rio Grande for many years both there, and at Embudo and Rio Grande, in the Territory of New Mexico.

Affiant further states that there are no tributaries of the river of any importance below Embudo to El Paso, or for two hundred miles below El Paso to the mouth of the Concho River. That while engaged in gauging the flow of the river, he was also engaged in ob-

serving the evaporation and discovered that the evaporation was over six feet from the surface per annum at El Paso, Texas, and as the region is arid for two hundred miles above and below El
23 Paso, it is presumed that the evaporation would be about the same for that distance, and that the impounding of a large quantity of the flow of the river in a lake as proposed would, in his opinion, largely increase the ordinary evaporation of the waters, as would also the distribution of the waters through numerous canals and ditches, as proposed, through the arid soil, and in addition thereto, there would be still a great loss by seepage into the dry and porous earth, a very small portion of which seepage would, in all prob-ility, return to the river, and this opinion is based upon his actual observation and knowledge of the irrigating systems of this country, soil and climate.

Affiant further states, that the Rio Grande receives the greater portion of its waters from its tributaries in Colorado and New Mexico, above Elephant Butte; that its next important tributary is the Concho River, which empties into the Rio Grande about two hundred miles below El Paso, Texas, that in the past ten years, the numerous ditches and canals taken out of the head waters of the river in Colorado and northe-n New Mexico, have impa-red the navigable capacity of the river continuously below, to the gulf during the summer months, but have not entirely destroyed it. What is stated just above generally, will be shown specifically in detail by an official report of assistant engineer W. W. Follett, on his investigations of the upper waters of the Rio Grande in Colorado and New Mexico, dated November 17th, 1896.

Affiant further states that in an official investigation, superintended by him, of a proposed lake similar to the one proposed with a dam sixty feet high, it was discovered that the cubic contents of the entire reservoir would be 537,340 acre feet and that if full of water, the evaporation from the surface for one year, would be six and one half feet off the surface or 130,000 acre feet of the total cubic contents of 537,340 acre feet, just about one-fourth the cubic contents of the lake. The evaporation was measured by actual test in the most skilled methods now known.

(Signed) ANSON MILLS.

Subscribed and sworn to before me this, the 23rd day of June, A. D. 1897.

24 (Signed) D. H. HART,
Clerk, U. S. Dist. Court,

(Signed) W. D. T.,
[SEAL.] By S. P. HODGSON, *Dy.*

Which said affidavit of Anson Mills on behalf of Compts., is — in words and figures as follows, to-wit:

No. 140. No. 1243. United States *vs.* The Rio Grande Dam and Irrigation Company *et al.* Affidavit of Anson Mills on behalf of Compts. Filed in my office this 25th day of June, 1897. W. B. Walton, Clerk, By H. B. Holt, Depty.

And thereafter, on the 5th day of June there was filed in the office of the Clerk of said Court, a writ of Injunction, which is in words and figures as follows, to-wit:

THE UNITED STATES OF AMERICA:

To the Rio Grande Dam and Irrigation Company, Greeting:

Whereas, the United States of America have filed their certain bill in Chancery in the United States District Court of the Third Judicial District of the Territory of New Mexico, against you, the said The Rio Grande Dam and Irrigation Company; your employees and agent, or any one under your authority, defendants, to be relieved touching the matters therein complained of and which said bill is still there pending,

We, therefore, in consideration of the premises and of the particular matters in said bill set forth do strictly enjoin and command you the said The Rio Grande Dam and Irrigation Company, your employés and agents, or any one under your authority, and each and every of you, under the penalty of the law thence ensuing, that you and and every of you, do absolutely desist and refrain from beginning, commencing, attempting building, constructing, creating or maintaining any dam, break-water, weir, structure, or obstruction of any character whatsoever across the Rio Grande River in the waters thereof, in the Territory of New Mexico, and especially at Elephant Butte or at any point thereon in said judicial district, or in any manner to begin the construction of, or to construct or create any structure, dam, or other obstruction of any character whatsoever, in such manner and to such extent as shall affect the navigable capacity of said Rio Grande river in said Territory of New
25 Mexico, until the further order of this court.

Witness the Hon. Gideon D. Bantz, Associate Justice of the Supreme Court of the Territory of New Mexico and presiding Judge of the Third Judicial District Court thereof, and the seal of said Court at Silver City, New Mexico, this 25th day of May, A. D. 1897.

[SEAL.]

W. B. WALTON,
Clerk and Register.

Which return of the U. S. Marshal of the above Writ is as follows:

TERRITORY OF NEW MEXICO,
County of Dona Ana:

Within Writ of Injunction came to hand May 30th, 1897, and was duly executed by me on the 31st day of May, 1897, by delivering a true and correct copy hereof to Phoebus Freudenthal at his place of business at Las Cruces in said County and Territory, the said Phoebus Freudenthal being one of the Directors of the Rio Grande Dam and Irrigation Company the within named defendants,

and the only officer of said Company to be found in Dona Ana County.

(Signed) E. L. HALL, *Marshal,*
" By E. E. BANNER, *Deputy.*

Which Writ of Injunction is endorsed in words and figures as follows, to-wit:

No. 140. No. 1243. Territory of New Mexico, Third Judicial District Court. United States of America *versus* The Rio Grande Dam and Irrigation Co. Writ of Injunction. Marshal's No. 74. Filed in my office Jun- 5, 1897, W. B. Walton, Clerk.

And thereafter, on the 25th day of June, A. D. 1897, there was filed in the office of the Clerk of said Court, a Plea & Answer, which is in words and figures as follows, to-wit:

26 *Joint and Several Pleas and Answer of the Rio Grande Dam and Irrigation Company and the Rio Grande Irrigation and Land Company, Limited, to the Bill of Complaint of the United States of America.*

In the District Court of the Third Judicial District of New Mexico for the Trial of the Causes Arising under the Laws of the United States.

To the Honorable Gideon D. Bantz, Associate Justice of the Supreme Court of the Territory of New Mexico and Judge of the Third Judicial District Courts thereof:

Plea.

These defendants by protestation not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true in such manner and form as the same are thereby and therein set forth and alleged, for plea to paragraph eight of said bill and to so much of said bill as alleges a ground for the relief sought that the proposed construction of the dam and reservoir of defendants at Elephant Butte, New Mexico, has never been affirmatively authorized by law and that such cannot lawfully be made until the plans of same have been submitted and approved by the Secretary of War; and to the prayer of relief based on such and similar allegations these defendants say:

That the site of its proposed construction of the said dam and reservoir at Elephant Butte in the Territory of New Mexico and of all and singular its proposed construction of dam and reservoirs is and are in the Territory of New Mexico and within the arid region of the United States;

And defendants further say that by the Acts of the Congress of the United States of October 2nd, 1888, and August 30th, 1890, and subsequent similar legislation it is provided by law among other

things for the survey and segregation of lands for reservoir sites in the said arid region by the officers of the Geological Survey and the Honorable Secretary of the Interior; that under said Acts of Congress and the rules and regulations adopted thereunder no restriction whatsoever is or has been placed or named as the stream or streams whether navigable or non-navigable upon which such
27 reservoir sites might be and have been surveyed and segregated; that under said Acts of Congress the Rio Grande River in the Territory of New Mexico from the Northern boundary of said Territory to its Southern boundary, has been surveyed under the direction of the Secretary of the Interior and a large number of reservoir sites selected thereon and upon the tributaries thereof; that divers such reservoir sites so surveyed and selected and among others, reservoir sites numbers Thirty-eight and Thirty-nine have been approved and reserved by the Secretary of the Interior acting in accordance with the laws of the United States; that the said reservoir site number Thirty-eight, within the Territory of New Mexico is situated a short distance above Elephant Butte in Sierra County, New Mexico, and that the said reservoir site Number Thirty-nine is situated at or near Palomas in said County and Territory some distance below said Elephant Butte; that the lands embraced within said reservoir sites last named and other such sites within the Territory of New Mexico have as aforesaid been segregated and reserved by the Honorable Secretary of the Interior, the said sites Number-Thirty-eight and Thirty-nine upon November 14th, 1891, that such reservation and segregation of all such sites including sites Numbers Thirty-eight and Thirty-nine has been recognized and affirmed by various Acts of Congress from August 30th, 1890, down to and including the Act of February 26th, 1897, by which said last mentioned Act it is provided that all such sites heretofore and hereafter to be approved should be thrown open to corporate and private entry under the Act of March 3rd, 1891; and that such approval of such reservoir sites by the Congress of the United States and such provisions for the entry of the same by private and corporate parties are without any reservations or restrictions whatsoever as to the navigability or non-navigability of the streams upon which the same are situated; that upon June 18th, 1897, in accordance with the provisions of the Act of February 26th of the same year the defendant the Rio Grande Dam and Irrigation Company *has* made application in the proper manner for the said reservoir sites numbers Thirty-eight and Thirty-nine, respectively, which said application is now pending.

28 And for a further plea defendants say, that the defendant the Rio Grande Dam and Irrigation Company is properly organized and doing business under the laws of the said Territory of New Mexico and has complied with all the laws of said Territory in reference to the construction of dams and reservoirs and the diversion of waters of public streams of said Territory, and that having complied with said laws the said defendant is authorized thereunder to construct its dams and reservoirs in the Rio Grande River in said Territory and divert the waters thereof; and the defendants further

say that the said Rio Grande Dam and Irrigation Company having first complied with the local laws, rules and regulations made and filed its articles of incorporation and proof of its organization with the Secretary of the Interior and made its application for its dam and reservoir at Elephant Butte, the construction of which is here sought to be restrained, before the Land Office of Las Cruces, New Mexico, and that such application and the map and survey of such dam and reservoir has a long time prior hereto and prior to the filing of the bill of complaint herein been approved by the Secretary of the Interior of the United States and is yet so approved and the construction of said dam and reservoir duly authorized under the provisions of an Act of Congress of March 3rd, 1891, under which said act application for such right to construct such dam and reservoir was duly made as aforesaid.

And defendants ask that the various reports of the Geological Survey of the United States and of the Secretary of the Interior showing such surveys of the Rio Grande River together with the maps of the various reservoirs and land segregated under authority of law as well as a certified copy of the map of the survey of the Elephant Butte reservoir duly approved under the authority of Congress by the Honorable Secretary of the Interior and herewith offered in evidence may be made a part of this plea;

All of which matters and things these defendants do aver to be true and that pleading such statutes and under said statutes and the Acts of the Honorable Secretary of the Interior in bar to the
29 plaintiff's bill or to so much thereof as hereinbefore particularly mentioned *and* pray judgment of this Honorable Court whether they should be compelled to make any other or further answer to the said bill or to so much thereof as is hereinbefore pleaded to and pray to be hence dismissed with their costs and charges in that behalf most wrongfully sustained.

(Signed) W. A. HAWKINS,
S. B. NEWCOMB,
ALBERT B. FALL,
Counsel for Def'ts.

TERRITORY OF NEW MEXICO,
County of Grant, ss:

Wilfred T. Johns being duly sworn on his oath says, That he is the Secretary of the Rio Grande Dam and Irrigation Company and the Resident Secretary of the Rio Grande Irrigation and Land Company, Limited; that he has read the foregoing plea and that the same is true in every particular in point of fact and that the same is not interposed for delay.

(Signed) W. T. JOHNS.

Subscribed and sworn to before me this Twenty-sixth day of June, Eighteen Hundred and Ninety-seven.

(Signed) J. F. POSEY,
[SEAL.] *Notary Public.*

We hereby certify that in our opinion the above plea is well founded in point of law.

(Signed) A. B. FALL,
S. B. NEWCOMB,
W. A. HAWKINS,
Counsel for Defendants.

The Joint and Separate Answer of the Rio Grande Dam and Irrigation Company and the Rio Grande Irrigation and Land Company, Limited, to the Amended Bill of Complaint of the United States of America, Filed by the Attorney General of the United States and the United States Attorney for the Territory of New Mexico in the Above-styles Court.

UNITED STATES OF AMERICA,
Territory of New Mexico:

In the District Court of the Third Judicial District of the Territory of New Mexico for the Trial of Causes Arising under the Laws of the United States.

These defendants now and at all times hereafter saving to themselves all and all manner of benefit or advantage of exception
30 or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained for answer thereto or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering say:

1st. They admit that the Rio Grande Dam and Irrigation Company is a corporation duly organized under and in pursuance of the laws of the Territory of New Mexico, having its principal place of business in the town of Las Cruces, County of Dona Ana in said Territory, and has for its purposes and objects the construction and maintenance of dams, reservoirs, ditches, canals and pipe lines as stated in said bill of complaint, and that in pursuance of its purposes of incorporation it has given out that it is about to construct dams across the Rio Grande in the Territory of New Mexico such as may be necessary to carry out the objects and purposes of its incorporation, and that it proposes to accumulate and impound water in such reservoirs and distribute the same through said canals, ditches and pipe-lines and that the Rio Grande Irrigation and Land Company, Limited, is a corporation organized under and by virtue of the laws of Great Britain and having its principal office in the City of London, England.

2nd. These defendants admit that the original defendant the Rio Grande Dam and Irrigation Company has entered into a contract and agreement for a conveyance to its co-defendant of some of its rights in and to its said dams, reservoirs, canals, ditches and pipe-lines to be constructed as charged in the bill of complaint herein and that said defendant the Rio Grande Irrigation and Land Company, Limited, has claimed and is claiming the right to exercise

all of the privileges and rights by it secured by virtue of said contract, as aforesaid, but in so far as that portion of said bill is concerned which charges that the said Rio Grand Irrigation and Land Company, Limited, is seeking to obtain control to the entire flow of said Rio Grande and to divert and use the same these defendants state that the entire flow of the Rio Grande during the irrigation season at the point or points where these defendants are seeking to construct reservoirs upon the same has long since be-
31 diverted and is now owned and beneficially used by parties other than these defendant- in which diversion and appropriation of said waters these defendants (have no property rights and that neither one of these defendants) are seeking or have ever sought to appropriate or divert by means of structures above referred to or contemplated diversion by means thereof of any of the waters of said Rio Grande usually flowing in the bed thereof during the time when the same are usually put to beneficial use by those who have heretofore diverted the same, but on the contrary these defendants state that it has been their intention by means of the structures which they contemplate and which are complained of in said bill to store, control, divert ans use only such of the waters of said stream as are legally diverted, appropriated, uses and owned by others and that these defendants have contemplated and now contemplate that any beneficial rights by them acquired in such stream by virtues of such structures will be very largely only so acquired to the excess, storm and flood waters thereof now appropriated useless and which go to waste.

3rd. These defendants deny *that* the statement that the Rio Grande receives no addition to its volume of water between Elephant Butte, at which place defendants admit they propose to erect a dam, and the mouth of the Concho River as alleged in said bill of complaint, and deny that the character of the soil and the quality of the atmosphere is such in the section of the country through which said river flows that the impounding of such waters either by means of evaporation or other causes of its distribution over the surface of the earth would prevent any material part of such water from returning to said river-bed.

4th. These defendants deny that the said Rio Grande is navigable or has been navigated by steamboats up to the town of Roma in the State of Texas as is alleged in complainant's bill or that the same is susceptible of navigation or has been navigated above said town of Roma or any point whatever, and deny that said river is susceptible of navigation from the point of rapids mentioned in said complainant's bill, above said town of Roma to La Joya in the Territory of New Mexico, and deny that said river has at any
32 times in the past been used beneficially for the purpose of floating or transporting rafts, logs or poles or that any portions of said stream in said Territory of New Mexico is susceptible of being used and navigated for commercial purposes, and deny that the said river is navigable or susceptible of being navigated for the purpose of carrying on commerce between the Territory of New Mexico and the State of Texas and the Republic of Mexico.

5th. These defendants deny that the impounding of the water of

said river by the construction of its said dam and reservoir at Elephant Butte or by any contemplated diversion by it of said waters for the uses above indicated will so deplete and prevent the flow of the water through the channel of said river below said dam as to seriously obstruct the navigability of said river at any point below said dam.

Defendants deny that they are proposing to construct said dam without the authorization of law, but on the other hand state and assert that they have full, complete and lawful authority to construct the same as it so proposes.

6th. These defendants deny that the navigability of said Rio Grande at the City of El Paso and State of Texas has been recognized and acknowledged by the Congress of the United States and the Secretary of War of the United States. And these defendants furthering answering deny that by treaty or treaty stipulations between the Government of the United States and the Government of Mexico it has ever been agreed and declared that neither country shall, without the consent of the other construct any work that may or might impede or interrupt in whole or in part the exercise of said right of free navigation, above the Southern boundary line of New Mexico, that is to say, above the parallel of 31° 47′ 30″ North latitude; and defendants aver that by the treaty stipulations between the said Government- it was agreed distinctly that each Government should have absolute sov-reignty over the said Rio Grande within its boundaries;

And the defendants further deny that neither of the Governments have consented to or authorized the construction of its dam at Elephant Butte, but allege on the contrary that the Government of the United States has consented to and authorized such construction as it has a right to do within its territorial limits.

33

And now having fully answered each and every allegation in said bill contained which the defendant- *is* advised it is necessary and material that *it* should make answer to, the defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) W. A. HAWKINS,
S. B. NEWCOMB,
ALBERT B. FALL,
Counsel for Defendants.

TERRITORY OF NEW MEXICO,
County of Grant, ss:

Wilfred T. Johns being duly sworn upon his oath says: That he is the Secretary of the Rio Grande Dam and Irrigation Company and the Resident Secretary of the Rio Grande Irrigation and Land Company, Limited, defendants in the foregoing answer; that he has heard read the said answer and knows the contents thereof; that the same and each and every allegation therein contained are true of his own knowledge except that he has no personal knowledge of the navigability of the Rio Grande below the town of Roma in the State of Texas, but that through official data, public maps and

statements of witnesses, some of which were sworn to, by said parties, he is informed and believes that the Rio Grande below the said town of Roma out to the Gulf is not capable of any beneficial use for the purpose of navigation.

(Signed) W. T. JOHNS.

Subscribed and sworn to before me this Twenty-fifth day of June, A. D. Eighteen Hundred and Ninety-seven.

[SEAL.] (Signed) J. F. POSEY,
Notary Public.

Which said plea and answer is endorsed in words and figures as follows, to-wit:

No. 140. No. 1243. District Court, Grant County. United
34 States of America *vs.* Rio Grande Dam and Irrigation Company and Rio Grande Irrigation and Land Company, Limited. Plea & Answer. Filed in my office Jun- 25, 1897. W. B. Walton Clerk. By H. B. Holt, Dep'ty.

And on the same day there was filed in the office of the Clerk of said Court, a Motion to Dissolve Injunction and Dismiss Bill, which is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District for the Trial of Causes Arising Under the Laws of the United States, in the Territory of New Mexico, Vacation, June 25th, 1897.

No. 140.

THE UNITED STATES
vs.
THE RIO GRANDE DAM CO. ET AL.

Injunction.

Come now the defendants in above entitled cause by W. A. Hawkins, S. B. Newcomb and Albert B. Fall, their solicitors, and *and* in answer to the rule to show cause heretofore issued herein file their joint and several plea and Answer to the original and amended bill of complaint—and upon the coming in and consideration of the same and the consideration of the several affidavits therewith filed together with the correspondence and volumes of—the 10th, 11th, & 12th, & 14th annual reports of the Secretary of the Interior, part Irrigation—and Vol. 3 & 4 report of the Senate Committee on arid lands—and report on irrigation 1893 Secretary of Agriculture and report of Sec'y of War to 51st Congress, with the maps of arid lands &c., move this Honorable Court here to discharge said rule and to dissolve the injunction heretofore granted herein and to dismiss the original and amended bill of complaint.

(Signed) W. A. HAWKINS,
S. B. NEWCOMB,
ALBERT B. FALL,
Counsel for D'f'ts.

Which Motion to Dissolve Injunction and dismiss bill, is endorsed in words and figures as follows, to-wit:

35 No. 140. No. 1243. United States, *vs.* The Rio Grande Dam & Irrigation Co., *et al.* Motion to Dissolve Injunction and Dismiss Bill. Filed in my office Jun- 25th, 1897. W. B. Walton, Clerk, By H. B. Holt, Dpty.

And thereafter, on the 26th day of June, A. D. 1897, there was filed in the office of the Clerk of said Court, a Replication, which is in words and figures as follows, to-wit:

In the United States District Court of the Third Judicial District of the Territory of New Mexico.

No. 140.

THE UNITED STATES OF AMERICA
versus
THE RIO GRANDE DAM & IRRIGATION CO. ET AL.

Replication of the United States of America, Complainant, to the Joint and Several Answer of Defendants in the Above-entitled Cause.

This replyant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith; that *they* will aver and prove *their* said bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the said defendants is uncertain, untrue and insufficient to be replied unto by this replyant; without this, that, any other matter or thing w-atsoever in the said answer contained, material or effectual in the law to be replied unto, confessed, and avoided, traversed or denied, is true; all which matters and things this replyant is, and will be, ready to aver and prove as this Honorable Court shall direct; and humbly prays, as in any by their said bill they have already prayed.

(Signed) W. B. CHILDERS,
U. S. Att'y for New Mexico.

Which Replication, is endorsed in words and figures as follows, to-wit:

36 No. 140. No. 1243. United States, *vs.* The Rio Grande Dam & Irrigation Co., *et al.* Replication. Filed in my office June 26th 1897. W. B. Walton, Clerk, By H. B. Holt, Dep'ty.

And thereafter on the same day there was filed in the office of the Clerk of said Court, a Motion to Set Defendants' pleas for Argument which is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico.

No. 140.

THE UNITED STATES OF AMERICA
versus
THE RIO GRANDE DAM & IRRIGATION CO. ET AL.

Comes now the plaintiff in the above entitled cause and moves the Court to set down the joint and several pleas as filed in said cause by the defendants therein, for argument as to their sufficiency as a defense to said suit, as a matter of law.

(Signed) W. B. CHILDERS,
U. S. Attorney for New Mexico.

Which Motion to set Defendants' Pleas for Argument, is endorsed in words and figures as follows, to-wit:

No. 140. No. 1243. United States, *vs.* The Rio Grande Dam & Irrigation Co., *et al.* Motion to Set Defendants' Pleas for Argument. Filed in my office this 26th day of June 1897, W. B. Walton, Clerk, By H. B. Holt, Dpty.

And thereafter, on the 31st day of July, A. D. 1897, there was filed and entered of record an Order Granting and Appeal, which is in words and figures as follows, to-wit:

37 In the District Court of the Third Judicial District of the Territory of New Mexico, Sitting for the Trial of Causes Arising under the Constitution and Laws of the United States.

No. 140.

UNITED STATES OF AMERICA, Complainant,
vs.
THE RIO GRANDE DAM AND IRRIGATION COMPANY ET ALS., Defendants.

Order.

And now this cause coming on to be heard the United States of America appearing by its attorney for the Territory of New Mexico, W. B. Childers, Esq., and with his appearing by courtesy T. A. Falvey and W. B. Brack, Esquires, of El Paso, Texas, and the defendants the Rio Grande Dam and Irrigation Company and the Rio Grande Irrigation and Land Company, Limited, by their solicitors, W. A. Hawkins, S. B. Newcomb, and A. B. Fall, Esquires, under the rule heretofore made upon the defendant Rio Grande Dam and Irrigation Company to show cause if any it had, why the injunc-

tion heretofore granted restraining it from erecting and maintaining a dom in the Rio Grande River at a point called Elephant Butte, fully described in the original and amended bill filed herein and in said order should not be continued; and the said complainant the United States of America having filed an amended bill in said cause making the Rio Grande Irrigation and Land Company, Limited, a party thereunder, and the said defendants in answer to said amended bill having filed a special plea in bar and having also answered said amended bill and also filed a motion to dissolve the injunction and to dismiss the original and amended bills so filed by complainant herein and the complainant thereupon having filed its motion to set down defendants' pleas for argument as to their sufficiency as defense to said suit as a matter of law and the court having heard the arguments of counsel, and having heard read the affidavits, extracts from Geological reports, Agriculture reports, reports of engineers and of the Secretary of War, histories, and other sources of information, and having had submitted to it official maps of the Territory of New Mexico and of the United States of America showing the source, trend, course and mouth of the
38 Rio Grande River in New Mexico and throughout the United States, and being fully advised thereby doth take judicial notice of the fact and doth hereby determine that the Rio Grande River is not navigable within the Territory of New Mexico, and doth find as a matter of law that said amended bill does not state a case entitling the complainant to the relief asked for in the prayer of said amended bill, and that the same is without equity, and the complainant having declined to further amend said bill the court doth

Order, adjudge and decree that the said injunction heretofore issued herein be dissolved and that said cause be and the same hereby is dismissed and that the defendants have and recover their reasonable costs herein to be taxed against the complainant.

And upon the complainant, the United States, in said cause praying an appeal from the order of the court dismissing said cause, it is ordered that said appeal be and the same hereby is granted as prayed.

(Signed) GIDEON D. BANTZ,
Judge and Chancellor.

Done at Chambers, this 30th day of July, A. D. 1897.

Which order dismissing injunction, is endorsed in words and figures as follows, to-wit:

No. 1243. Filed in my office Jul- 31, 1897. W. B. Walton, Clerk.

Charged.

Recorded.

And thereafter, on the 10th day of August, A. D. 1897, there was filed in the office of the Clerk of said Court, A Rule to Send up Original Papers, which is in words and figures as follows, to-wit:

In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1897.

UNITED STATES OF AMERICA, Appellants,
vs.
THE RIO GRANDE DAM AND IRRIGATION COMPANY ET AL., Appellees.

Stipulation having been entered into in this cause by and
39 between the parties thereto by their respective counsel, that the appeal taken in said cause may be docketed and heard at the present term of this court to the same effect as if the same had been sued out more than thirty days prior to the first day of the term, and said stipulation having been submitted to the Court,

It is hereby ordered, that said cause be docketed and set for hearing for the twentieth day of August, A. D. 1897.

It is further ordered, that the filing of the transcript of the record required by the statutes and the rules of the court be dispensed with, and that the Clerk of the District Court of the Third Judicial District be and he is hereby ordered to certify and return to the Clerk of this Court all the original papers in said cause now on file in his office with all convenient speed. Said papers to be used upon the hearing of said cause in lieu of a certified transcript thereof.

It is further ordered that after the hearing of said cause, a copy of said papers and record be prepared and certified and left on file with the Clerk of this Court as the record in said cause, and that the original papers thereafter be returned to the Clerk of the said District Court.

It is further ordered that the printing of the record in said cause be dispensed with.

UNITED STATES OF AMERICA.
Territory of New Mexico, Supreme Court:

I, Geo. L. Wyllys, Clerk of the Supreme Court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and perfect copy of an order made by said Supreme Court in the above entitled cause as the same appears on file and of record in my office.

Witness my hand and the seal of the Supreme Court this 9th day of August, A. D. 1897.

[SEAL.] (Signed) GEO. L. WYLLYS.

Which rule to send up original papers, is endorsed in words and figures as follows, to-wit:

40 No. 753. No. 1243. Supreme Court, Territory of New Mex., July Term 1897. United States *vs.* Rio Grande Dam & Irrigation Co. *et al.* Rule to send up Original Papers. Filed in my office Aug. 10, 1897. W. B. Walton, Clerk.

Charged.

And thereafter, on the 15th day of July, A. D. 1899, there was filed in the office of the Clerk of said Court, a Mandate, which is in words and figures as follows, to-wit:

The Territory of New Mexico to the District Court sitting within and for the *County of* 3rd Judicial District, Greeting:

Whereas, In a certain cause lately pending before you wherein the United States of America was Appellant and the Rio Grande Dam & Irrigation Company and the Rio Grande Irrigation and Land Company, Limited, were Appellees, by your consideration in that behalf, judgment was entered against the said Appellant; and

Whereas, the said cause and judgment were afterwards brought into our Supreme Court for review by appeal, whereupon such proceedings were had in said Supreme Court that at the July, 1897, Term thereof, on the 25th day of August, 1897, it was considered that the judgment aforesaid, by you in form given, be affirmed and that injunction heretofore issued be dismissed, and

Whereas, said cause and judgment was afterwards taken by appeal to the Supreme Court of the United States, where by consideration of said Court at its October, 1898, Term, it was considered that the judgment aforesaid be reversed and that said cause be remanded to this Court with instructions to set aside the decree of dismissal, and order an inquiry into the question, whether the intended acts of the defendants in the construction of a dam and the appropriation of the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of its present navigability, and if so to enter a decree restrain- those acts to the extent that they will so diminish.

Now, Therefore, You are hereby commanded to reinstate said cause upon your docket and set aside said decree of dismissal therein, and to reinstate the bill of complaint, and proceed in ac-
41 cordance with the terms of said mandate of the Supreme Court of the United States.

Witness, the Honorable William J. Mills, Chief Justice of the Supreme Court of the Territory of New Mexico, and the seal of said Court, this 14th day of July, A. D. 1897.

[SEAL.] (Signed) JOSE D. SENA, *Clerk.*

Which mandate is endorsed in words and figures as follows, to-wit:

1243. Filed in my office Jul- 15, 1899. James P. Mitchell, Clerk.

And thereafter, on the 22nd day of January, A. D. 1900, there was filed and entered of record in the office of the Clerk of said Court, the Findings of Fact, which is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico.

No. 1243.

UNITED STATES OF AMERICA, Plaintiff,
vs.
RIO GRANDE DAM & IRRIGATION COMPANY ET ALS., Defendants.

Findings of Fact.

From evidence in this case, the Court makes the following findings of fact:

I.

The Rio Grande is navigable only between the American points of Rio Grande City and the mouth of such river, a distance of 262 miles, measured by the sinuosities of the stream. It is navigated only between Rio Grande City and Brownsville, Texas, a distance of 177 miles, by such sinuosities.

II.

That such navigation began to decline on account of scarcity of water in such river in 1888, and has continued to so decline until at the present time the same consists of occasional trips of one small vessel of about 100 tons capacity. Such trips are irregular
42 and uncertain, and so spasmodic as to time, as to render such navigation of small benefit to commerce between points reached thereby.

III.

That the decline of such navigation has been occasioned by a gradual decline in the navigable capacity of such river, and the increased difficulty of navigation the same on account of scarcity of water, compelling the substitution from time to time of boats of less capacity.

IV.

The scarcity of water in said river where it is navigable, is due largely to a drouth of great severity, which has continued with only occasional inter-uptions since about 1887, and has extended over a vast area of country several hundred miles in width and length along the general course of said river from its mouth up, and which has both effected portions of Texas and Mexico, and to the drying up of the following named tributaries of such river, lying either in Texas or Mexico, to-wit, Elm creek, Los Moros, Piedras Pintas, Sycamore, San Felipe, Escondido, San Diego, Las Bacas, Trientauno, Santa Carlo, Cienegas and Salado, all referred to in the report of Major Emory, as well as described by the witnesses in this case, and all of which were from ten to eighteen years ago bold running streams.

V.

There is no evidence from which the Court can estimate the extent of the diminution of such rain-fall, or from which it can determine that there has been any permanent change in the amount of rain-fall in said region, or the amount of such effect of such diminution in rain-fall and drying up of streams has had upon the navigable capacity of said river since the commencement of this suit in May, 1897.

VI.

At the measuring station at San Marcial, forty miles above Elephant Butte, the Rio Grande is shown from the evidence and measurements filed in this case, to be largely a torrential stream, varying from a dry bed to floods of considerable size and duration, and this torrential flow characterizes its entire course through New Mexico.

43 VII.

In its course, both in Colorado and New Mexico, a large percentage of its waters are constantly lost by causes not accurately determined, but generally classed as seepage and evaporation, and between San Marcial, New Mexico, and El Paso, Texas, a distance of 300 miles measured by the sinuosities of the river, it is shown that the percentage of loss from such causes is about one-third of the entire volume of such water, and at various other points in New Mexico, such losses, more or less equal in percentage, are also shown to occur.

VIII.

While there are no measurements from which the percentage of loss by evaporation from the volume of water after the same passes El Paso, Texas, can be definitely determined, yet the general character of the bed, banks, formation and soil, is shown to be of the same general character as that portion of such stream lying between San Marcial and El Paso, where such large losses in volume have been accurately determined and that for a distance of 400 miles below El Paso, Texas, measured by the sinuosities of the river, to Presidio del Norte, such seepage and evaporation continues to diminish the volume of such waters.

IX.

Between Elephant Butte, the point where defendants propose to divert the waters of such stream, and Presidio del Norte, a distance of 640 miles, by the sinuosities of the stream, there are no living tributaries to said Rio Grande, and the waters of such stream are not reinforced substantially between such points by any regular flow or tributary, and there is no perennial flow of the Rio Grande at Presidio del Norte.

X.

The first perennial tributary of the Rio Grande, below Elephant Butte, is the Conchos, which comes into the Rio Grande at Presidio

del Norte. The Conchos is a perennial stream rising in the mountains of Northern Mexico, and flowing several hundred miles northerly into the Rio Grande. In season it is a torrential stream
44 of great magnitude, and at all times carries a considerable quantity of water. A cross-section of the Rio Grande, near and just below where the Conchos joins it, shows an area at least twenty-five times as great as the area of a cross-section of the Rio Grande just above the mouth of the Conchos, measured to the highest water mark known, so far as disclosed by the evidence, in thirty-three years, the carrying capacity of the lower cross-section being variously estimated at from sixteen to twenty-five times as great as the upper cross-section.

XI.

It has only been shown by the evidence that the waters in the Rio Grande bed pass Presidio del Norte, the mouth of the Conchos, in considerable quantities upon one occasion, that is during the month of May, 1897, but it is fairly inferable from the testimony that such waters have so passed such points on other occasions, in such quantities. No evidence has been offered as to the amount then so passing the mouth of the Conchos, in the Rio Grande bed, except that of one witness to the effect that the h-ight*h* of the same, over a ford some distance below the mouth of the Conchos (the dimensions of the river at that point not being shown) was increased about three feet, and the duration of its passage at such height*h* was for about eight or ten days, and except some estimates, based upon the surface area of the cross-sections referred to showing the flow to be 3250 cubic feet per second. And I find that the evidence fails to show that at the period mentioned, the waters so flowing by the mouth of the Conchos affected the height*h* of the river at Laredo, Texas, to any considerabe extent.

XII.

It appears from the evidence, that the Rio Grande was navigated in a common row boat drawing about six inches of water, during the winter season of 1893-1894, from El Paso, Texas, to the mouth of the Conchos, a distance estimated at 400 miles by the sinuosities of the stream, at a stage of water from 3 to 3½ feet deep at El Paso, Texas, at the time of starting, said trip occup-ing twenty-one days, and without finding any obstructions in said stream, except
45 scarcity of water for the last forty miles above the mouth of the Conchos. That after remaining a period of eighteen days in the vicinity of Presidio del Norte, the party making said trip embarked upon water said to have been furnished from the Rio Conchos, and continued to Del Rio, Texas, a distance of 562 miles by the sinuosities of the stream.

XIII.

There is no evidence in the case tending to show that there is any obstruction to the free and uninterrupted flow of the Rio Grande from Del Rio, Texas, to Rio City, Texas.

XIV.

There is no evidence in the case tending to show that water which has reached Del Rio, Texas, would not uninterruptedly continue to flow to Rio Grande City, Texas, except such portions thereof as may be lost by seepage or evaporation.

XV.

The Conchos river enters the Rio Grande from the Mexican side at nearly right angles. On the lower or southerly side of the Conchos there is elevated ground, upon which is situated the village of Presidio del Norte. On the upper or northerly side of the Conchos, and on the westerly or Mexican bank of the Rio Grande, the land is low and subject to much over-flow. On the American side of the Rio Grande, at the mouth of the Conchos, the banks are high and not subject to overflow.

XVI.

The distance by the sinuosities of the River between Presidio del Norte and Rio Grande City is something over 900 miles, and the bed of the stream between such points appears to be practically a succession of basins or *b*alleys of greater or less extent, and of the same character, and affording the same facilities for absorbing the water as the valleys above El Paso, or those above the mouth of the Conchos, and I find that large amounts of water flowing between the Conchos and the Rio Grande City are lost between said points by evaporation and seepage.

46 XVII.

The character of the formations in the basins or valleys of the Rio Grande, at the only point where the same has been sounded to any great depth, that is, by the Boundary Commission at El Paso, Texas, show the depth of sand and gravel to be at least sixty feet, and I can see no reason why the other valleys and basins along the course of the Rio Grande should not show the same formation to at least the same depth, the surfac*t* indications and appearance being substantially the same throughout its length.

XVIII.

The water shed of the Rio Grande and its tributaries above Elephant Butte is approximately 25,000 square miles in extent. The water shed between Elephant Butte and El Paso is approximately 5,700 square miles. The water shed from Elephant Butte to Rio Grande City, of the Rio Grande and its tributaries, after deducting the area of such basins as may not find an out-let into the stream, is approximately 170,000 square miles. The source of supply of the waters flowing past Rio Grande City at the head of navigation is largel; this comparatively enormous water shed of 170,000 square miles between Elephant Butte, feeding with tropical rains the Conchos and San Juan particularly, rising far south in the mountains

of Mexico and flowing north into the Rio Grande, and also affording a supply for the Pecos, Devil's River, the Good Enough and other perennial streams, as well as the decreased but still flowing waters of the San Felipe and Salado, and at times filling with floods the now dry beds of the former peren-ial streams heretofore referred to, as well as many smaller streams not named.

XIX.

Records have been kept of the flow of water passing El Paso, Texas, for a part of the year 1899, and for the years 1890, 1891, 1892, part of 1893, 1897, 1898 and part of 1899. No records were kept for any other years. These records so kept show the amount of
47 water passing El Paso for said years respectively, to be as follows, viz:

From May 1st, to Dec. 31st, 1889.....	370,000	acre feet.
1890	971,000	"
1891	1,943,000	"
1892	941,000	"
Jan. 1st, to July 1st, 1893.....	329,000	"
1897	1,369,000	"
1898	689,000	"
From Jan. 1st, to Sept. 30, 1899.....	70,000	"

The River after having been dry, commenced to run about December 10, 1899.

XX.

The evidence shows that certain cross-sections were taken by a member of the International (Water) Boundary Commission, at a certain point one mile below Rio Grande City, Texas, which indicates the amount of water required to raise the river at that point, as appears from the following table.

Estimated Flow of Rio Grande One Mile Below Rio Grande City, Texas, Conditions Assumed: River at Low Water; Sudden Rise Comes, Rising 1 ft. in Four Hours at First and Going on up to High Water.

Stage of river.	Cross-sect., sq. ft.	Fall.	Current.	Flow, sec. ft.	Add % for possible scour.	Max. flow, sec. ft.	Added water for rise.	
Low water.	1226	1:7000	1.63 ft. sec.	1998	.....	1998	343 S. F.	1655 S. F. at L. W.
1 ft. rise.	1591	1:6950	1.90 "	3023	1 %	3053	1398 "	
2 " "	1971	1:6900	2.14 "	4218	2 "	4302	2647 "	
3 " "	2363	1:6850	2.40 "	5671	3 "	5841	4186 "	
4 " "	2765	1:6800	2.64 "	7300	4 "	7592	5937 "	
5 " "	3167	1:6750	2.88 "	9121	5 "	9597	7922 "	
6 " "	3594	1:6700	3.12 "	11213	6 "	11886	10231 "	
7 " "	4018	1:6650	3.33 "	13380	7 "	14316	12651 "	
8 " "	4448	1:6600	3.52 "	15657	8 "	16909	15254 "	
9 " "	4883	1:6550	3.73 "	18214	9 "	19853	18198 "	
10 " "	5324	1:6500	3.92 "	20870	10 "	22957	21302 "	
11 " "	5770	1:6500	4.10 "	23675	" "	26023	24368 "	
12 " "	6222	1:6600	4.24 "	26381	" "	29019	27364 "	
13 " "	6678	1:6700	4.39 "	29316	" "	32248	30593 "	
14 " "	7139	1:6800	4.53 "	32340	" "	35574	33919 "	
15 " "	7604	1:6900	4.66 "	35435	" "	38978	37323 "	
16 " " = H. W.	8123	1:7000	4.80 "	38990	" "	42889	41234 "	

48 After passing 11 ft. this does not show all of flood flow, as water would begin at this height to leave river above cross-section.

Flow at low water—no rise.....	1226	1:10000	1.35 ft. sec.	1655				
Flow Dec. 17,'97, 2.1 ft. up....	2009	1:10000	1.84 "	3697				

XXI.

The evidence shows that a cross-section was also taken twenty-one miles (by river) above Brownsville, Texas, and shows the capacity of the river at said points to be as follows:

Estimated Flow of Rio Grande, 21 Miles (by River) Above Brownsville, Texas—Conditions Assumed; River at Low Water; Sudden Rise Comes, Rising 1 ft. in 4 Hours at First, and Going on up to High Water.

State of river.	Cross-sect., sq. ft.	Fall.	Current.	Flow, sec. ft.	Add % for possible scour.	Max. flow, sec. ft.	Added water for rise.	
Low water..	1198	1:6300	1.60 ft. sec.	1917	.....	1917	336 S. F.	1581 S. F. at low water.
1 ft. rise.	1588	1:6200	1.92 "	3045	1 %	3079	1498 "	
2 " "	1989	1:6100	2.24 "	4455	2 "	4544	2963 "	
3 " "	2396	1:6000	2.55 "	6110	4 "	6354	4773 "	
4 " "	2808	1:5900	2.84 "	7975	5 %	8373	6792 "	
5 " "	3223	1:5800	3.11 "	10023	7 "	10724	9143 "	
6 " "	3641	1:5800	3.37 "	12270	8 "	13252	11671 "	
7 " "	4062	1:5700	3.60 "	14623	9 "	15939	14358 "	
8 " "	4485	1:5700	3.82 "	17133	10 "	18846	17265 "	
9 " "	4913	1:5700	4.03 "	19800	" "	21780	21099 "	
10 " "	5344	1:5900	4.17 "	22284	" "	24512	22931 "	
11 " "	5777	1:6100	4.28 "	24725	" "	27197	25616 "	
12.1" " — H. W..	6257	1:6300	4.42 "	27656	" "	30421	28840 "	

After passing 8 ft. or 9 ft. this does not show all of flood flow, as water would begin at this height to leave river channel above cross-section.

Flow at low water—no rise.....	1198	1:9000	1.32	1581				
Flow M'ch 24,'98, 1.3 ft. up.....	1700	1:9000	1.66	2822				

XXII.

The testimony in the case shows the following table of distances, viz:

Distances Along Rio Grande, Scaled from Map.

From—	To—	Distance by channel.	Distance along axis.
Headwaters	Del Borte		80 miles.
Del Norte	Colorado State Line		65 "
State Line	Embudo		65 "
Embudo	White Rock Canon		30 "
White Rock Canon	(Length)		15 "
White Rock Canon	Albuquerque		50 "
49 Albuquerque	San Marcial		105 "
San Marcial	Elephant Butte		40 "
Elephant Butte	Fort Seldon		65 "
Fort Seldon	El Paso		60 "
El Paso	Lower End El Paso Valley		80 "
Lower End Valley	Mouth of Conchos River		125 "
Mouth of Conchos	Mouth of Pecos		250 "
Mouth Pecos	Mouth Devil's River		35 "
Mouth Devil's River	Eagle Pass		65 "
Eagle Pass	Laredo		110 "
Laredo	Mouth Salado River	70 miles	55 "
Mouth Salado	Mouth Alamo	50 "	35 "
Alamo	Roma	8 "	5 "
Roma	Mouth San Juan	12 "	10 "
Mouth San Juan	Rio Grande City	2 "	2 "
Rio Grande City	Brownsville	177 "	95 "
Brownsville	Mouth Rio Grande	85 "	30 "

XXIII.

The proposed dam and reservoir of the Defendants would contain 11,036,722,000 cubic feet of water, or 253,370 acre feet of water.

XXIV.

The defendants propose to irrigate 230,000 acres of valley, and 300,000 acres of Mesa lands, in all 530,000 acres. In accordance with the amount of water used in Colorado and New Mexico for irrigating land, it will require 954,000 acre feet of water to irrigate that quantity of land proposed to be irrigated by defendants, or from three to four times the capacity of said reservoir.

XXV.

The testimony shows the following to be the time it would have taken all the flow of the Rio Grande to have filled the Elephant Butte reservoir, supposing it to hold 253,000 acre feet during the maximum flow in each year, from El Paso gauging station, viz:

1889,	All of May flow, and 8 or 10 days of June flow....	40	days.
1890	From May 15th to June 3rd.....	19	"
1891	From May 12th to May 20th.....	9	"
1892	From May 2nd to May 17th.....	16	"
1893	From April 25th to May 31st.....	37	"
1897	From May 24th to June 3rd.....	11	"
1898	Two Floods, April 22nd, to May 8th, and July 17th to July 25th.....	26	"

50 1899 No flood. Total flow for year only 70,000 acre feet at El Paso.

XXVI.

The testimony shows the time necessary each year to fill the proposed Elephant Butte reservoir of the Defendants, supposing it to hold 253,000 acre feet, and starting at the beginning of Spring flood and allowing enough water to pass proposed Dam to supply all ditches below it (assuming this amount to be 500 second feet for the El Paso Valley), would be as follows: viz:

1889	From record of El Paso *gua*ging station, all surplus flow above 500 second feet, from May 1st to June 15th.....	46	days.
1890	Same conditions, from April 17th to May 19th....	33	"
1891	" from April 12th to May 3rd.....	22	"
1892	" from April 15th to May 7th.....	23	"
1893	All surplus flow above 500 second feet at El Paso *gua*ging station, for irrigation season, would lack 11,000 acre feet of filling reservoir.		
1897	From record of El Paso *gua*ging station, all surplus flow above 500 second feet, From April 13th, to May 11th.....	29	days.
1898	Same conditions, from April 17th to June 20th....	65	"
1899	During whole season only 6500 acre feet passed El Paso *gua*ging station above the 500 second feet.		

XXVII.

That the evidence shows that cross-sections of the Rio Grande were taken by a member of the Boundary Commission to the extent of three or four per mile for the entire distance from Rio Grande City to Brownsville, Texas, and that the *teo* cross-sections hereinbefore referred to, were a fair indication of the contour of the Rio Grande between those points.

XXVIII.

In attempting to arrive at a conclusion in this case, I have made some computations based partially upon known data, and
51 partially upon probabilities arising from the evidence. In such computation I have assumed the following conditions.

1. It appears by comparison of the tables of measurements at the gu*a*ging stations of San Marcial and El Paso, that there is no material flattening or tailing out of the floods in the Rio Grande. If this remains th*r*ue throughout the entire course of the river, a body of water passing El Paso would reach Rio Grande City, if at all, in practically the same form as to length and height*h* as at El Paso, less losses between those points.

2. It seems probable from the conditions of the bed and banks of the stream, and the climate of the country through which it passes, that any flow of less than 2,000 second feet at El Paso, or 3,000 second feet at San Marcial, cannot possibly have any effect on the river at the head of navigation. It also seems probable that only such flows as are above this amount, and are sustained for a considerable period, could reach the head of navigation in substantial quantities.

3. It seems probable that loss by seepage and evaporation will be as great between El Paso and Presidio del Norte as between San Marcial and El Paso, the loss may be greater owing to greater distance.

4. From Presidio to Rio Grande City, flood waters from El Paso would encounter in the bed the peren-ial waters known to exist there. To what extent they furnish a water table for these flood waters to travel upon is unknown, but I have assumed in this computation, that losses by seepage and evaporation are thereby lessened and have taken an arbitrary twenty per cent. as representing the probable loss from such causes.

5. It seems probable that a flood passing El Paso would reach Rio Grande City, if at all, in from fifteen to twenty-five days, assuming the River to have comparatively a uniform fall between those points.

6. It appears from the evidence that a rise of two feet above low water between Rio Grande City and Brownsville is necessary to make navigation practicable, and these waters usually flowing down to that point, if at all, at a season when other supplies are low, I assume a rise of 2 ft. to be necessary to be of any substantial benefit to navigation.

52 Assuming these conditions, I have prepared the following table:

Year.	Duration of flood over 2,000 Sec. Ft. Days (at El Paso):	Acre feet passing El Paso during time of flood.	Acre feet passing Presidio Del Norte supposing 33⅓% is lost.	If 20% is lost between Presidio and Rio Grande City, this would raise *Rio* river at Rio Grande City the following amounts above low water for time flood was passing El Paso:	If 45% is lost between El Paso and Presidio del Norte and 20% between Rio Grande City, this would raise river at Rio Grande City the following amounts above low water for time flood was passing El Paso:
1890.	April 7th to July 3rd. } 76 days...	733,570	489.050	2.0 ft. for 75 days.....	1.6 ft. for 75 days.
1891.	April 12th to July 4th. } 94 days...	1,464,210	976,140	3.0 ft. for 94 days.....	2.5 ft. for 94 days.
1892.	April 15th to July 21st. } 68 days...	770,300	513,600	2.2 ft. for 68 days.....	1.9 ft. for 68 days.
1893.	April 29th to May 29th. } 31 days...	239,500	159,700	1.5 ft. for 32 days.....	1.3 ft. for 32 days.
1894.	No record, but as dry as	1893, and possibly drier.			
San Marcial. 1895.	April 12th to June 30th. } 72 days.	634.700 at San Marcial 33⅓% off 423.100 at El Paso.	282.100	1.2 ft. for 72 days.....	0.9 ft. for 72 days.
San Marcial. 1896.	April 13th to May 14th. } 31 days.	236,200 at San Marcial 33⅓% off 157.500 at El Paso.	105.000	1.0 ft. for 30 days.....	0.8 ft. for 30 days.
1897.	April 21st to July 4th. } 75 days...	983,200	655,500	2.6 ft. for 75 days.....	2.1 ft. for 75 days.
1898.	April 20th to May 13th. } 24 days...	186,400	124,100	1.5 ft. for 24 days.....	1.3 ft. for 24 days.
1899.	No flood.				

53 Assuming the loss from seepage and evaporation between El Paso and Presidio del Norte to be forty five per cent. instead of thirty three and a third, (which would be at the same rate of loss per mile as is shown to occur between San Marcial and El Paso), the result, assuming all other conditions to be as hereinbefore stated, would be as shown in the last column of the foregoing table.

It will be observed that the above results show a contribution from floods passing El Paso to the navigable capacity at Rio Grande City to the extent of a rise of two feet during four of the ten years mentioned, when 33-1/3 per cent. is deducted for loss between El Paso and Presidio, and during three years out of the ten years, counting 1892, when 45 per cent. is deducted between the same points. It is to be further observed that no account is taken in above computations for variations in the height of floods at El Paso but the results simply show the average height a given amount of water passing El Paso, less deductions for probable loss, would raise the river at Rio Grande City for the same number of days it was passing El Paso. If these variations continue from El Paso to Rio Grande City, the beneficial effect on navigability would be lessened owing to corresponding irregularity in the height of the rise at the latter point.

How reliable such results may be cannot be determined from the evidence. Whether the loss is less or greater between the points named is unknown. There is some evidence in the case tending to disprove the correctness of such results, for example, the testimony of Daly to the effect that the 1897 flood only lasted eight or ten days at Presidio del Norte, and the testimony of Turpin that the same flood made no appreciable change in the river at Laredo, and the affidavit of Kelly to the effect that they have had no floods from the upper Rio Grande in recent years. On the whole, I am unable to say to how much credit the results of such computations are entitled in arriving at the ultimate fact in question in this case.

XXIX.

54 There is no direct testimony in this case showing that any given quantity of water in the Rio Grande passing El Paso reaches Rio Grande City, the head of navigation, and there accomplishes any certain effect upon navigability of the stream.

XXX.

That the waters of the Rio Grande passing El Paso occasionally in seasons of high and protracted floods reach Rio Grande City, the head of navigation, in considerable quantities seems probable, but that they reach that point in quantities sufficient and in such form as to substantially add to the navigable capacity of the stream is not satisfactorily established by the evidence, nor can such a conclusion be satisfactorily deduced therefrom. I therefore find that the intended acts of the defendants in the construction of a dam or dams, or reservoir, and in appropriating the waters of the Rio Grande, will not substantially diminish the navigability of that stream within the limits of present navigability.

Let a decree be preapred and entered dismissing the bill of complaint herein.

(Signed) FRANK W. PARKER,
Judge, &c.

Albuquerque, N. M., Jan. 1, 1900.

Which Findings of Fact is endorsed in words and figures as follows, to-wit:

No. 1243. United States of America, Territory of New Mexico, In the District Court Third Judicial District. United States of America, Plaintiff, *vs.* Rio Grande Dam and Irrigation Co., *et als.* Defendants. Findings of Fact. Filed in my office Jan. 2, 1900. James P. Mitchess, Clerk.

Charged.

55 And thereafter, on the 3rd day of January, A. D. 1900, there was filed and entered of record in the office of the Clerk of said Court, the Motion for Rehearing, which is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico.

No. 1243.

UNITED STATES OF AMERICA, Plaintiff,
vs.
RIO GRANDE DAM & IRRIGATION COMPANY ET ALS., Defendants.

Motion for Rehearing.

Now comes the plaintiff in the above entitled cause, by W. B. Childers, United States Attorney for the Territory of New Mexico, M. C. Burch and W. P. Sutton, special assistant United States Attorneys, and files this its motion and petition for rehearing, and for ground of said motion alleges the following.

I.

Because the said plaintiff, since the trial of said cause, has discovered new evidence, which evidence could not by any reasonable diligence on the part of the said plaintiff, have been discovered and procured for, use on the former trial of this cause.

Said evidence consists of the facts set up and alleged in the affidavit of Frank P. Clark, dated January 2nd, 1900, hereto attached and made a part of this motion. From an inspection of the said affidavit, it will appear that the facts therein stated and which will be testified to by the said Clark on said rehearing of said cause, and that the said plaintiff can procure and will procure the depositions of Doctor J. B. Grady, who now resides at Eastport, Maine, and also the depositions of William Kelly, whose present whereabouts is un-

known to the plaintiff, but which can be ascertained and his deposition procured for use on said trial.

II.

An inspection of said affidavit will show that the Rio
56 Grande was navigated by the said Clark and his companions in the year 1881, from El Paso to Presidio del Norte in a boat very much larger than the one testified to have been used on a similar journey by the witness Jas. H. McMahan, and the evidence of said witness will show that the Rio Grande was very much larger than the Rio Conchos, and carried such a volume of water as to show conclusively that said river has largely contributed to the navigability of the stream below Rio Grande City, Texas.

III.

An inspection of said affidavit will show that said evidence will establish the fact that the bed and channel of the Rio Grande above the mouth of the Conchos was very much larger than the bed and channel of the Conchos at its mouth, and that neither the Conchos or any other tributary above its mouth was at that time contributing any considerable amount of water to the volume of the water then in the Rio Grande.

IV.

That said evidence shows or tends to show that there was no perceptable loss, either by seepage or any other cause, in the waters of the Rio Grande from El Paso to the mouth of the Concho, and that on the contrary said Rio Grande maintained its volume of water unimpaired and apparently fully equal at the mouth of the Concho to what it was when the said parties set out from El Paso; thus tending to disprove the allegations of loss by seepage in said Rio Grande between El Paso and the mouth of the Concho.

V.

The plaintiff as a further ground for said rehearing, alleges that since the rendition of the opinion by the Supreme Court of the United States in this cause, remanding the same for a new trial, there have been no spring floods in the Rio Grande which could have been measured; that the plaintiff was compelled to proceed to trial without any opportunity to have such measurements made, and that if a rehearing is granted in this case, the plaintiff will cause gauge
57 stations to be established at a point in the Rio Grande some ten miles above the mouth of the Concho; in the Rio Concho some five miles above its debouchere; in the Rio Grande some two miles below the junction of the Concho with the Rio Grande; and also one in the Rio Grande just above the mouth of the Pecos; one in the Pecos some distance above its mouth; one in Devil's River, some distance above its mouth; one in the Rio Grande just below the debouchere of Devil's River, and others at Eagle Pass, Laredo, and Rio Grande City, Texas. And that cross-sections will be made of the bed of the Rio Grande at some twenty or more places be-

tween El Paso and just below the mouth of the Rio Concho, and in the Rio Grande near the mouth of the Pecos, and at Eagle Pass and Laredo, and such other points as the Court may indicate. That at such *guage* stations plaintiff will locate observers who shall make accurate measurements of the volume and flow and capacity of the said streams, with a view to identifying any and all rises of water, which during the coming Spring floods shall pass El Paso, Texas; to show their amount, volume and flow at the various points named in the River below that point, and eventually the amount which they or each of them contribute to the navigable capacity of the River at Rio Grande City, Texas. And that said measurements and the reports of such observers, together with the cross-sections previously mentioned, shall be supervised or done under the direction of W. W. Follett, the Civil Engineer connected with the United States and Mexican Boundary (Water) Commission, and by him produced and identified at the time of said rehearing.

VI.

As a condition for the granting of said rehearing, the plaintiff consents to enter into a stipulation with the defendants, that said cause may be reheard in the month of July or August, and if an appeal is desired by either party, to the Supreme Court of the Territory, that the same may be heard in said Supreme Court at such adjourned term of the court as may be fixed by the Court, and if any appeal from the decision of that Court is desired by either party, that the same shall at once be taken so that it will be returnable to the ensuing October term of the Supreme Court of the United States.

58

VII.

In support of this motion, and to show the diligence on the part of the plaintiff, plaintiff files herewith the affidavit of W. P. Sutton, one of its attorneys who was engaged in the preparation of said cause for trial, and will file and use, as soon as the same can be procured, the affidavit of M. C. Burch, one of plaintiff's attorneys, who was engaged in the preparation of said cause for trial, the plaintiff being unable to file the same at this time on account of the fact that the said Burch is in the City of Washington, District of Columbia.

VIII.

The plaintiff further offers and consents to use the testimony already taken in a new trial or rehearing of this cause.

Wherefore, plaintiff prays the Court to set aside the findings made, and decree, if the same has already been entered in this case, and grant the rehearing prayed for.

(Signed) W. B. CHILDERS,
United States Attorney.
M. C. BURCH,
W. P. SUTTON,
Of Counsel.

In the District Court of the United States for the Third District of the Territory of New Mexico, Sitting for the Trial of Causes Arising under the Constitution and Laws of the United States.

Injunction, No. 1243.

THE UNITED STATES, Plaintiff,

vs.

RIO GRANDE DAM & IRRIGATION CO. ET ALS., Defendants.

Affidavit to Support Motion for a New Trial.

WESTERN DISTRICT OF TEXAS,
County of El Paso, ss:

Frank P. Clark, having been duly sworn deposes and says, that: He resides in the City of El Paso in said County and District, and has resided since 1877, except that for the years 1892 to 1895, he resided in Tularosa, New Mexico, that he is Special Deputy Collector of Customs for the United States for the district of Paso del Norte, Port of El Paso, Texas, and that his age is 47 years.

Affiant further states that, in the Spring 1881, he together with Dr. James B. Grady, James Tayes and William Kelly, all
59 then residing in El Paso, Texas, agreed among themselves upon a trip along the lower waters of the river Concho in the State of Chihuahua in the Republic of Mexico, in search of gold, that, in pursuance of this agreement he and the others named above caused to be constructed in the City of El Paso, Texas, in the month of April, 1881, a large row boat made of California red wood, some twenty (20) feet long and some six (6) feet wide, in which they proposed to navigate the Rio Grande from said City of El Paso down to or below the mouth of said Concho River. Said boat was of the dimensions aforesaid, was propelled by oars two on each side, and steered by a rudder. It was entirely covered by an awning securely held by posts and carried at the front an American and at the stern a Mexican flag.

That the said boat so constructed and equip-ed carried also a supply of provisions and other things deemed necessary for the enterprise.

That, during the month of April, 1881, the Rio Grande had been flowing a steady stream not at very high flood, but in such volume as to induce them to think they could successfully navigate down to said Concho, and, that, on May 5, 1881, (the Cincoode Mayo of Mexico) the said Clark, and the said Grady, Kelly and Tayes, each and all embarked in said boat at or near the ferry crossing on said Rio Grande between said City of El Paso and the City of Paso del Norte, Mexico, (Now Ciudad Juarez) about the hour of twelve o'clock on said day, and in the presence of a large number of friends and spectators, for their journey down said Rio Grande.

That, the Rio Grande was not then at a high flood stage, but, was flowing a good volume of water ample for their purpose. That, the current was swift, the river confined within its banks for nearly the entire distance, the most noted exceptions being occasional overflows of a mile or so in width in the El Paso valley, immediately below El Paso, Texas. That, in much of the way the walls of the stream were of rock and quite high, often more than one hundred feet, with, in all its course, a very swift current. That said Clark and his companions made very quick time, jumping several falls of three to six feet safely in their boat, and in two instances taking said boat out and skidding it around to avoid ugly protruding rocks in the bed of the stream.

That, the flow or volume of the stream kept up mightily, in fact seemed to increase, although they had no rains en route, nor did any stream discharge into said river so far as said Clark recalls. That, at the close of the fifth day, or say on May 9, 1881, the said party passed the mouth of the Concho River, and stopped on the American side at the town called Presidio del Norte, opposite the Mexican town of Ojinaga in the State of Chihuaha, in the Republic of Mexico. That, the boat came the whole journey safely, having at all times on the way an ample supply of water, and that in the last stages the volume of water in the stream appeared to be really larger and deeper than when they left El Paso, Texas.

That, they passed the mouth of the Concho on the fifth and last day of their river trip, and that in comparison with the Rio Grande said Concho was a mere creek, and that the waters of the Rio Grande set back up into the mouth of said Concho for some little distance, and the said Concho was flowing a clear stream not to exceed apparently one foot in depth, and not to exceed one fourth of the width of the regular channel stream of the Rio Grande at that place and time.

That, on their course down the Rio Grande there were no side valleys or low lands of any appreciable extent, except in the El Paso Valley above mentioned, and that the waters of the said stream were not lost or dissipated by the way, but flowed fully and apparently integrally reaching and passing the mouth of the Concho in full flow and volume.

That, said Clark and the others of his party stopped at the said town of Presidio del Norte, at the house of one Richard Daly for five days, that there they outfitted with a team, wagon and other articles, and there also sold their said boat to said Daly for as affiant recollects, seventy-five ($75.00) dollars, and then set out about May 15, 1881, in wagon to pass up the course of the said Concho in search of gold.

That, on the said wagon journey they several times forded the river Concho and in no place was it a considerable stream, but, narrow and shallow. Affiant further states that, during the five days which he remained at Daly's he was in constant sight of the Rio Grande and had personal knowledge that it maintained its
60 volume, and flowed continuously on toward the mouth and that from all the facts in his knowledge this volume of water flowing in said Rio Grande was not, during that time, appreciably

increased by the waters of the Concho, but, that the said Rio Grande was fed and maintained wholly by water passing at El Paso, Texas, similar to those on which they embarked.

That said Clark and the others of his party continued on their wagon journey until they arrived at the City of Chihuahua, and thence returned to El Paso, Texas, where they arrived on or about June 5, 1881.

Affiant declares that to the best of his belief Dr. J. B. Grady now resides at Eastport, Maine, and that he will fully corroborate all the within statements. That, as to William Kelly he is not aware of his present address, but, knows a relative of Kelly's through whom he thinks said Kelly's address can be obtained, and that he too, will fully confirm all the statements herein, and that, as to James Tayes he verily believes him to have died several years since in California.

Affiant further declares that he has no interest of any part in this matter except to tell the facts for such use as they may serve.

FRANK P. CLARK.

Subscribed to and sworn to before me this the 2nd day of January, 1900.

——— ———.

(Copy.)

In the District Court of the Territory of New Mexico, Third Judicial District.

No. 1243.

UNITED STATES OF AMERICA, Plaintiff,
vs.
RIO GRANDE DAM & IRRIGATION CO. ET ALS., Defendants.

Affidavit of W. P. Sutton.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

W. P. Sutton, of lawful age, being duly sworn, on oath deposes and says: That he was specially employed by the Attorney General of the United States to assist the Special United States Attorney, Judge M. C. Burch, also a special attorney in said cause, in the preparation of the said cause for trial, which was set for the 12th day of December, 1899; that affiant was so employed on October 23rd, 1899, and from said date up to the present time; that on the said 23rd day of October, 1899, he proceeded to Washington, D. C., and thereupon proceeded to enter upon the preparation of the cause.

That about the first day of November, 1899, he reached Eagle Pass, Texas; and from there proceeded to Laredo, Texas, Rio
61 Grande City, Texas, and Brownsville, Texas, in diligent search of witnesses who might testify as to the navigable

capacity of said Rio Grande in past years, and down to the present time, and secured at each of said places various persons whose depositions were afterwards taken and used in said cause.

That owing to the extreme distance and difficulties of travel, it was impossible for said affiant to obtain said depositions and to reach Las Cruces until the 10th day of December; that he had no time to make any stay or study in El Paso, Texas, and was not aware at that time, nor until since the trial of said cause that any evidence could be obtained in El Paso, Texas, and was informed during the trial of said cause by W. W. Follett, a person well experienced in such matters, and who was a member of the Boundary Commission, and who had charge of said river for several years in his official capacity, that so far as he knew, no person had ever in recent years, navigated said Rio Grande from El Paso any considerable distance down stream, except the witness McMahan, who had testified in person.

But that on the conclusion of the trial of this cause, said affiant proceeded to El Paso, Texas, and shortly thereafter discovered that Frank P. Clark, now a special deputy collector of customs at that place, had in company with three others in the year 1881, made said journey, and said Clark detailed to this affiant the facts set forth in the affidavit of said Clark filed in this cause in support of the motion for rehearing.

That said affiant is informed and believes that M. C. Burch, said special attorney aforesaid, was after the 10th day of November, 1899, and for some three weeks thereafter in and about El Paso, Texas, and diligently inquired of said Follett and others as to the facts relating to said Rio Grande, and that thereafter said Burch, on or about the first day of December, 1899, resorted to the City of Mexico in an earnest endeavor to there obtain witnesses as to the volume and flow of water in the Rio Concho, and other facts material to that trial of said cause; and that said Burch only returned to El Paso on or about the 8th day of December, 1899, and accompanied affiant to Las Cruces on the 10th day of December, 1899.

62 Affiant gave no attention to the preparation for trial, and procuring of evidence to be used on the trial of said cause, at El Paso, and was only enabled to remain there a portion of Sunday, December 10th, 1899, leaving the procurement of such evidence at that point to the Associate Counsel, M. C. Burch.

Affiant verily believes, that if the offer of the Government to establish *guaging* stations, as set forth in its motion for rehearing filed in this cause, is accepted and said measurements made, that the Court will be enabled to determine definitely and with accuracy, the amount of contribution to the navigability of the Rio Grande made by that stream by waters from above Elephant Butte, and at the same time the observations or readings heretofore made at Del Norte, Colorado, Embudo, Rio Grande and San Marcial, N. M., can be continued and produced at the rehearing, and will assist in enabling the Court to ascertain the loss between various points therein named, and thus to determine the facts material to the cause.

(Signed) WARNER P. SUTTON.

Subscribed and sworn to before me this the 2nd day of January, A. D. 1900.

[NOTARIAL SEAL.] (Signed) E. L. MEDLE,
Notary Public, Bernalillo County, New Mexico.

Which Motion for Rehearing is endorsed in words and figures following, to-wit:

No. 1243. Territory of New Mexico. In the District Court, Third Judicial District. United States *vs.* Rio Grande Dam and Irrigation Company. Motion for Rehearing. Filed in my office Jan. 3, 1900. James P. Mitchell, Clerk. W. B. Childers, U. S. Att'y. Charged.

63 And thereafter, on the 9th day of January, A. D. 1900, there was filed and entered of record in the office of the Clerk of said Court, the Final Decree, which is in words and figures as follows, to-wit:

In the District Court of the United States for the Third Judicial District of the Territory of New Mexico, Sitting for the Trial of Causes Arising under the Constitution and Laws of the United States.

No. 1243.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
THE RIO GRANDE DAM AND IRRIGATION COMPANY ET ALS., Defendants.

This cause coming on to be heard on the 9th day of January, A. D. 1900, on the motion for re-hearing heretofore filed in this cause by the plaintiff, and upon the affidavits of Marsden C. Burch, Warner P. Sutton and Frank P. Clark filed by the plaintiff in support of said motion, and the affidavit of Frank P. Clark filed by the defendant in opposition thereto, all parties being before the Court by their attorneys, and the Court being advised as to the law and the premises, it is Ordered, Adjudged and Decreed by the Court that the said Motion of the plaintiff be and the same hereby is in all things over-ruled.

Now this cause coming on again to be heard on the testimony, pleadings, findings, of facts heretofore made by the Court and filed on January 2, 1900, and the record heretofore taken and made in this cause, all parties being present by their respective attorneys of record, and the argument of counsel being heard, and the Court being fully advised as to the law and the premises, it is Ordered, Adjudged and Decreed by the Court that the bill of complaint of the plaintiff herein be and the same hereby is dismissed.

It is further Ordered, Adjudged and Decreed by the Court that the defendants do have and recover of and from the plaintiff the costs of this suit, to be taxed by the register.

Whereupon, the plaintiff, by its United States Attorney,
64 prays an appeal from the foregoing decree, to the Supreme Court of the Territory of New Mexico, which appeal is hereby granted.

(Signed) FRANK W. PARKER,
Judge, &c.

Done in Chambers, this 9th day of January, A. D. 1900.

Which final Decree is endorsed in words and figures following, to-wit:

No. 1243. United States of America, Territory of New Mexico. In the District Court, Third Judicial District. United States of America, Plaintiff, *vs.* Rio Grande Dam and Irrigation Co., *et als.*, Defendants. Final Decree. Filed in my office Jan. 9, 1900. James P. Mitchell, Clerk.
Charged.
Recorded.

And thereafter, on the 30th day of April, A. D. 1902, there was filed and entered of record in the office of the Clerk of said Court, the Mandate, which is in words and figures as follows, to-wit:

The Territory of New Mexico to the District Court, sitting within and for the Third Judicial District of the Territory of New Mexico, Greeting:

Whereas, in a certain cause lately pending before you, wherein the United States of America, was plaintiff, and the Rio Grande Dam & Irrigation Company, *et als.*, were defendants, numbered 1243, in said District Court, by your consideration in that behalf, judgment was entered against said plaintiff; and

Whereas, The said cause and judgment were afterwards
65 brought into our Supreme Court for review, by appeal, whereupon such proceedings were had in said Supreme Court affirming the judgment of the Court below, and

Whereas, The said cause and judgment, so affirmed, were afterwards removed to the Supreme Court of the United States, by appeal, wherein by the consideration of the said Supreme Court of the United States, such proceedings were had at the present October term, in the year of Our Lord, 1901, whereby the said Supreme Court of the United States, reversed the judgment of our Supreme Court, and ordered this cause to be remanded to our Supreme Court, in the following Language: viz: "And be it further ordered by this Court that this cause be, and the same is hereby, remanded to the said Supreme Court with directions to reverse the decree of the District Court and to remand the cause to that court with directions to grant leave to both sides to adduce further evidence, March 3, 1902" and the said mandate of the Supreme Court of the United States, having been duly filed with the Clerk of this Court and having been brought to our attention,

Now, Therefore, You are hereby commanded to reinstate said cause upon your docket and grant leave to both sides to adduce further evidence, and otherwise to proceed in accordance with the said Mandate of the Supreme Court of the United States.

Witness, The Honorable William J. Mills, Chief Justice of the Supreme Court of the Territory of New Mexico, this the 28th day of April A. D. 1902.

[SEAL.] JOSE D. SENA, *Clerk.*

Which Mandate is endorsed in words and figures following, to-wit:

66 1243. No. 879. In the Supreme Court of the Territory of New Mexico. January Term, A. D. 1903. The United States of America, Appellant, *vs.* The Rio Grande Dam & Irrigation Company, *et al.*, Appellees. Mandate. Filed in my office Apr. 30, 1902. James P. Mitchell, Clerk.

And thereafter, on the 22nd day of January, A. D. 1903, there was filed and entered of record in the office of the Clerk of said Court the Petition of Territory to Intervene which is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico.

No. 1243, Injunction.

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE RIO GRANDE DAM & IRRIGATION COMPANY ET AL., Defendants.

Petition for Intervention.

Now comes the Territory of New Mexico, by Edward L. Bartlett, her Solicitor General, and for and on behalf of the said Territory moves the Court for an order allowing the said Territory to intervene in this cause and be joined as a defendant herein, and be heard in opposition to the Bill of Complaint filed herein, and for the grounds of such motion alleges that it has an interest in said litigation in the success of the defendant herein and desires to unite with it in resisting the claim of the plaintiff in this suit, and sets forth the following facts, as grounds for such intervention.

1.

That the construction of the defendant Company's proposed storage dam at Elephant Butte, and of its proposed distributing dams and other irrigation works below, in Sierra and Dona Ana Counties of this Territory, would be of great benefit to the people of

67 the Territory generally, and especially to the land owners, farmers, and others, in the valleys below Elephant Butte.

2.

The Congress of the U. S. by its act approved June 21st, 1898, granting lands to the Territory of New Mexico in section six thereof,

provided as follows: "For the establishment of permanent water reservoirs for irrigating purposes, 500,000 acres: for the improvement of the Rio Grande in New Mexico, and the increasing of the surface flow of the water in the bed of said river, 100,000 acres." That under said Act, there has been a large amount of land selected and located for the benefit of the purposes named. The Territorial legislature has appointed and provided for an irrigation commission for the purpose of disposing of such lands and that a large amount of the same have already been contracted for by the said commission and the Territory for sale or lease, and a considerable amount of money has been received by the Territory on that account—and that if the contention of the plaintiff in this case should prevail, it would render such grant of 600,00– acres of land utterly valueless, and of no use or benefit to said Territory or any of its inhabitants, and would produce great complications and hardships upon those who have already paid money for the purchase and lease of said land.

3.

That in seeking to enjoin the said defendant company from building its proposed storage dam and other irrigation works as above mentioned, on the ground that to propound the flood waters of the Rio Grande at Elephant Butte for irrigation in the valleys below would substantially diminish the navigable capacity of the Rio Grande within the limits of present navigation, *i. e.*, between Brownsville and Rio Grande City, Texas, about 1200 miles below Elephant Butte, measured by the sinuosities of the stream, the plaintiff seeks to draw an invidious distinction between the rights of the people of New Mexico and those other states and territories of the Union.

4.

That if the storage of the flood waters of the Rio Grande
68 at Elephant Butte be inhibited, on the ground that such storage would substantially diminish the navigable capacity of that stream below Rio Grande City, Texas, then also the storage of flood waters at other points on the Rio Grande and its tributaries in New Mexico may likewise be inhibited?

5.

That in New Mexico the annual rainfall is so sligh- that successful cultivation of the soil is practically impossible without water for irrigation, and that therefore the right to impound, and utilize for irrigation, the flood waters of the Rio Grande and its tributaries is essential to the welfare and prosperity of our people; for if denied such right, there can be no substantial increase of the area of the Territory's cultivated lands which at present does not exceed 200,000 acres, and consequently our people would forever remain dependent upon neighboring states for the bulk of their food supplies.

6.

That "the reclamation and settlement of the arid lands" of New Mexico will tend to "enrigh every portion" of the Territory, "as the products of irrigation will be consumed chiefly in upbuilding local

centres of mining and other industries, which would *other industries, which would* otherwise not come into existence at all" and that consequently the Territory of New Mexico as such, and the entire people thereof, have a vital interest at stake in this cause and are therefore entitled to intervene.

7.

That prior to the inception of this suit, the General Government had, by the survey and reservation of reservoir sites in the Valley of the Rio Grande in New Mexico, clearly indicated its purpose to treat the waters of the Rio Grande and its tributaries as suitable for irrigation only.

8.

That the General Government has never attempted to inhibit the use of the flood waters of the Rio Grande for irrigation in Colorado, and that until the inception of this suit, no attempt has been made to restrain the citizens of New Mexico from appropriating and using the flood waters of the stream for irrigation and other beneficial purposes.

69

9.

That the non-representation of the Territory at the inception and during the progress of this suit has been detrimental to the clear presentment to the Courts of the great interests of the people of New Mexico in the premises, and that it is essential to the safeguarding of the Territory's best interests that it be directly represented, and be allowed to present arguments and evidence as to the true purpose of the defendant Company (which counsel for the plaintiff has incorrectly stated) to the end that the real facts of the case may be placed clearly before all Courts in which the cause may be heard hereafter.

10.

That this honorable Court should take judicial notice of the fact that from certain of the affidavits and reports presented in support of the plaintiff's contention in the premises—notably from the affidavit of General Anson Mills of the International Boundary Commission, as subscribed and sworn to by him on the 23rd day of June, A. D. 1897; from a letter of the said Anson Mills, dated El Paso, November, 17th, 1896, addressed to the Honorable Secretary of State, Washington, D. C., from a letter of the Honorable Richard Olney, Secretary of State, dated Washington, November 30th, 1896, to the Honorable Secretary of the Interior; and from a letter of the said Secretary of State, dated Washington, January 29th, 1897; to the said Secretary of the Interior, it is patent that "the objection to the building of the said defendant company's proposed dam grows out of the proposed construction of an International Dam and reservoir at El Paso, Texas, thus evidencing the deliberate intention of the General Government, by its political Department, to take measures, not for the purpose of improving the navigability of the Rio Grande, "but for the purpose of appropriating the flood waters of the river for the irrigation of certain lands lying below the southern boundary

of the Territory of New Mexico in the Republic of Mexico and in the State of Texas; and that in maintaining this suit against the defendant Company the plaintiff seeks under the guise of a question of the navigability of the stream, to obtain an adjudication of the
70 interests of rival irrigation projects, "to the permanent injury of the Territory of New Mexico.

Wherefore, as New Mexico's right to appropriate and utilize for beneficial purposes the waters of her catchment area is of paramount importance to her people, the said Territory, by its Solicitor General, prays this honorable Court to grant to the Territory permission to intervene as aforesaid in this cause.

(Signed) EDWARD L. BARTLETT,
Solicitor General for New Mexico.

Which Petition of Intervention is endorsed in words and figures following, to-wit:

No. 1243 In the District Court. Third Judicial Dist. The U. S. A. *vs.* Rio Grande Dam & Irr. Co. Petition of Territory to Intervene. Clerk will file as of Jan. 22/03. Filed in my office Jan. 22 1903 James P. Mitchell, Clerk.
Charged.

And thereafter on the 22nd day of January, A. D. 1903, there was filed and entered of record in the office of the Clerk of said Court the Judgment Denying Petition of Intervention of Territory, which is in words and figures following, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
THE RIO GRANDE DAM & IRRIGATION COMPANY ET AL., Defendants.

71 *Petition of the Territory to Intervene.*

This cause coming on to be heard on the application of the Territory of New Mexico to intervene therein, The Territory being represented by its Solicitor General, Edward L. Bartlett, Esq. and the plaintiff by its United States Attorney, William B. Childers Esq. The Court being fully advised in the premises, doth order, adjudge and decree that the said petition of the Territory be and the same hereby is denied. To which the said petitioner then and there excepted.

(Signed) FRANK W. PARKER, *Judge.*

Done at Santa Fe, New Mexico while in attendance on the Supreme Court this 22nd day of January, A. D. 1903.

Which judgment is endorsed in words and figures following, to-wit:

1243 United States *vs.* Rio Grande Dam & Irrigation Co. Judgment denying petition of Intervention of Territory. Clerk will file as of Jan. 22/03. Filed in my office Jan. 22 1903. James P. Mitchell, Clerk.

Charged.

Recorded.

And thereafter, on the 7th day of April, A. D. 1903, there was entered of record in the office of the Clerk of this Court the order granting leave to file said supplemental complaint, which is in words and figures as follows, to-wit:

No. 1243.

UNITED STATES OF AMERICA
vs.
THE RIO GRANDE DAM AND IRRIGATION COMPANY ET AL.

Civil.

Now comes the plaintiff in the above entitled cause and moves the Court to file a supplemental bill of complaint in said cause; and the said supplemental complaint having been presented to the Court, the said motion is sustained, and leave granted accordingly.

Read and approved in open court.

(Signed) FRANK W. PARKER,
Associate Justice, Judge, &c.

72 And thereafter, on the 7th day of April, A. D. 1903, there was filed and entered of record in the office of the Clerk of this Court the Supplemental Complaint, which is in words and figures as follows, to-wit:

In the District Court, Fifth Judicial District, Territory of New Mexico.

THE UNITED STATES OF AMERICA
vs.
THE RIO GRANDE DAM AND IRRIGATION COMPANY and Others.

Supplemental Complaint.

The plaintiff in the above entitled cause, by William B. Childers United States Attorney for the Territory of New Mexico, acting under instructions of the Honorable Attorney G-neral of the United States, files this its supplemental complaint, and alleges that on the 19th day of June A. D. 1897, the plaintiff filed its amended bill in chancery in said cause, praying for the relief prayed for in the

original bill filed in said cause, that said supplemental bill made new parties to said cause, the Rio Grande Dam and Irrigation Company being the only defendant in the original bill, that said amended bill in addition to the last named defendant, also made the Rio Grande Irrigation and Land Company, Limited, a defendant in said cause. Plaintiff further alleges, that by the said amended bill of complaint, it was among other things alleged that the said defendant corporations proposed to construct, and were constructing, or about to construct a dam in the Rio Grande at a point called Elephant Butte in the Territory of New Mexico, and in the Fifth Judicial District thereof, said Elephant Butte being about one hundred and twenty-five miles above the City of El Paso in the State of Texas, for the purpose of creating a reservoir and diverting the waters of said river into ditches and canals and using the same for irrigation and other purposes; and further alleged that the navigability of the said Rio Grande at the City of El Paso in the State of Texas had
73 been recognized and acknowledged by the Congress of the United States and the Secretary of War, and that the impounding of the waters of the said river at said point by the construction of said dam and reservoir would so deplete and prevent the flow of the water through the channel of said river below said dam as to seriously obstruct the navigable capacity of the said river throughout its entire course from said point at Elephant Butte to its mouth. Said amended bill further alleged that the construction of said dam had never been affirmatively authorized by law, and the plans and specifications for the construction of the same had not been submitted to the Secretary of War for his approval, and that the location and plans had not been submitted and approved by him, and that no dam or other obstruction to the navigable capacity of any waters could be lawfully constructed until the same has first been affirmatively authorized by law and plans for such obstruction had been submitted and approved by the Secretary of War. Said amended bill, among other things, prayed for an injunction restraining the defendant from beginning and commencing, or attempting to construct or build said dam and reservoir, and for general relief. To the said amended bill the defendants filed a plea, and in and by said plea, it set up as a defense to said suit that it had complied with all the requirements of the Act of Congress approved March 3rd, 1891, (26 Statutes at Large 1095-1102) and had acquired a right to construct said dam and divert said water by reason of compliance with the terms of said Act, which said defense so made, as appears by said plea, is as follows:

"And for a further plea defendants say that the defendant, the Rio Grande Dam & Irrigation Company, is properly organized and doing business under the laws of the said Territory of New Mexico, and has complied with all the laws of said Territory in reference to the construction of dams and reservoirs and the diversion of waters of public streams of said Territory, and that having complied with said laws the said defendant is authorized thereunder to construct its dams and reservoirs in the Rio Grande River in said Territory and divert the waters thereof; and the defendants further say that

the said Rio Grande Dam & Irrigation Company having first complied with the local laws, rules, and regulations, made and filed its articles of incorporation and proof of its organization with the Secretary of the Interior, and made its application for its dam and reservoir at Elephant Butte, the construction of which is here sought to be restrained before the land office at Las Cruces, New Mexico, and that such application and the map and survey of such dam and reservoir has a long time prior thereto and prior to the filing of the bill of complaint herein been *been* approved by the Secretary of the
74 Interior of the United States, and is yet so approved, and the construction of said dam and reservoir duly authorized under the provisions of an act of Congress of March 3rd, 1891, under which said act application for such right to construct such dam and reservoir was duly made as aforesaid.

Plaintiff further alleges that upon the issues raised by said plea and the answer of said defendants filed in said cause, the District Court heard said cause and rendered a decree dissolving the temporary injunction theretofore granted and dismissing the plaintiff's bills of complaint, that from this decree the plaintiff appealed to the Supreme Court of the Territory, which last mentioned court affirmed the decree of the District Court, and that from the decree of the Supreme Court of the Territory the plaintiff appealed to the Supreme Court of the United States, and that the last mentioned court reversed the decree of the Supreme Court of the Territory, and remanded said cause with instructions to the Supreme Court of the Territory to enter a decree reversing the District Court and remanding the cause to that court to take proofs to determine, in effect, to what extent the Rio Grande was navigable, and to what extent the construction of said dam would impair its navigability, that the Supreme Court of the Territory remanded said cause with instructions in accordance with the mandate of the Supreme Court of the United States.

Plaintiff further alleges that thereupon the District Court proceeded to take proofs in accordance with said mandate and instructions and made findings of facts, and thereafter plaintiff asked leave to reopen said cause and to be permitted to offer additional testimony, which motion was overruled and the cause dismissed, and from this decree the plaintiff again appealed to the Supreme Court of the Territory, and on the hearing of this appeal this decree of the District Court was affirmed by the Supreme Court of the Territory, and that thereupon the plaintiff appealed from this second decree of affirmance by the Supreme Court of the Territory to the Supreme Court of the United States, and that the decree of the Supreme Court of the Territory was a second time reversed, and said cause again remanded to the Supreme Court of the Territory with instructions to enter a decree of reversal, and to remand the cause to the District Court with directions to reopen the cause and permit addi-
75 t-onal proofs to be offered, which was accordingly done by the Supreme Court of the Territory.

For any further allegations as to the record and proceedings in said cause, plaintiff refers to record itself, deeming the recital above made sufficient to show the status of the cause in this Court for the

purpose of asking leave to file this Supplemental Complaint. Plaintiff further alleges that the proceedings above alleged having been had, the cause stands upon the docket of this court for hearing and decree.

II.

Plaintiff further alleges that defendant's plea above referred to, claiming a right to construct said dam under the said act of Congress approved March 3rd, 1891, was filed on June 26th, A. D. 1897, and that its articles of incorporation and proof of its incorporation, and the map and survey of its reservoir had been filed and approved by the Secretary of the Interior long prior to the filing of said plea, as appears from an inspection of said plea itself.

III.

Plaintiff further alleges that in and by section twenty of the said act of March 3rd, 1891, above referred to, it was provided "that if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch or reservoir, to the extent that the same is not completed at the date of the forfeiture," and that although five years since the filing and approval of said articles of incorporation, proofs of organization, maps and surveys have long since elapsed, defendant has not complied with the requirements of said act, but has failed to construct or complete within the period of five years after the location of said canal and reservoir any part or section of the same, and the same has by reason thereof become forfeited.

IV.

Plaintiff further alleges that during all of said time, except from May 24th, 1897, to —— 1897, the date when the temporary injunction was dissolved, the said defendants have been in no wise
76 hindered, restrained or prevented from complying with the provisions of said act by any judicial order or process whatsoever.

V.

Wherefore, plaintiff prays to be permitted to file this Supplemental Bill of Complaint, and that the same be considered upon the hearing of this cause, and that the defendants be decreed to have forfeited all the rights they may have had, or claimed under and by virtue of said act of March 3rd, 1891, not hereby admitting, however, that the defendants ever acquired any rights under and by virtue of said act.

Plaintiff further prays that the injunction, and all other relief prayed for in and by said amended bill of complaint, be granted, and that said injunction be made perpetual, and that it have and

recover its costs expended in this cause, and thus plaintiff will ever pray.

(Signed) WM. B. CHILDERS,
United States Attorney for New Mexico,
Attorney for Plaintiff.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

William B. Childers, of lawful age, being duly sworn, deposes and says that he is United States Attorney for the Territory of New Mexico; and upon his official oath says that the matters and things in the foregoing complaint are true, except such as are therein stated to be upon information and belief, and those he believes to be true to the best of his knowledge, information and belief.

(Signed) WILLIAM B. CHILDERS.

Subscribed and sworn to before me this 4th day of April, A. D. 1903.

[SEAL.] (Signed) E. L. MEDLER,
Notary Public.

TERRITORY OF NEW MEXICO,
County of Dona Ana, Third Judicial District, ss:

No. 1243.

THE UNITED STATES OF AMERICA
vs.
THE RIO GRANDE DAM AND IRRIGATION COMPANY ET AL.

Wm. B. Childers being duly sworn on oath says, that on
77 the 7th day of April, 1903, he the said affiant, United States Attorney for the Territory of New Mexico, served a copy of the Supplemental Complaint to which this affidavit is attached on the defendants in said cause, by delivering a true copy thereof to A. B. Fall, Esq., one of the attorneys of record for said defendants at Las Cruces, N. M., on said day.

(Signed) WM. B. CHILDERS.

Sworn to and subscribed before me on this the 7th day of April, A. D. 1903.

[SEAL.] (Signed) JAMES P. MITCHELL, *Clerk.*

Which said Supplemental Compalint is endorsed in words and figures following, to-wit:

No. 1243. In the District Court of the Third Judicial District of the Territory of New Mexico. United States of America, Plaintiff, *vs.* Rio Grande Dam & Irrigation Company, *Et Al.*, Defendants. Supplemental Complaint. Filed in my office Apr. 7, 1903. James P. Mitchell, Clerk. W. B. Childers, U. S. Attorney for New Mexico, Attorney for Plaintiff.

Charged.

And thereafter, on the 21st day of May, 1903, there was filed and entered of record in the office of the Clerk of this Court the Certificate of Non-Answer, &c. to Amended Petition, which is in words and figures following to-wit:

In the District Court, Third Judicial District, Territory of New Mexico.

UNITED STATES OF AMERICA
vs.
RIO GRANDE DAM & IRRIGATION COMPANY ET AL.

78 I, the undersigned, Clerk of the District Court of the Third Judicial District, Territory of New Mexico, do hereby certify that no demurrer, answer, or other pleading of any kind has been filed in said cause by the defendants therein, The Rio Grande Dam & Irrigation Company and others, since the filing of the Supplemental Bill in said cause by the plaintiff on the seventh day of April, A. D. 1903.

[SEAL.] (Signed) JAMES P. MITCHELL,
Clerk of the District Court of the Third Judicial District, Territory of New Mexico.

Which said Certificate of Non-Answer, &c., is endorsed in words and figures following, to-wit:

No. 1243. Certificate of Non-Answer, &c., to Amended Petition. Filed in my office May 21, 1903. James P. Mitchell, Clerk.

And thereafter, on the 21st day of May, A. D. 1903, the Decree allowing Injunction, which is in words and figures following, to-wit:

In the District Court, Third Judicial District, Territory of New Mexico.

UNITED STATES OF AMERICA
vs.
RIO GRANDE DAM & IRRIGATION COMPANY ET AL.

This cause coming on to be heard upon the motion of the plaintiff, by United States Attorney W. B. Childers, Esq., and it appearing to the Court that a supplemental bill was filed herein, by its leave, on the seventh day of April, A. D. 1903, and that copies of the said bill were served more than thirty days past upon the attorneys of record of the *de*defendants in said cause, and it further appearing from the certificate of the Clerk of the said Court that no demurrer, answer or other pleading has been filed to said supplemental bill by the defendants in said cause, and the Court being fully informed in the premises, the Court does find that the allegations of said supplemental bill are confessed and are true; and further especially
79 finds that the articles of incorporation and the map, survey of the reservoir of the defendant corporation, the Rio Grande

Dam and Irrigation Company, were filed with the Secretary of the Interior prior to the twenty-sixth day of June, A. D. 1897, and were prior to said date approved by the Secretary of the Interior; and it further finds that the said defendants have not completed its said reservoir or said ditch, or any section thereof, within five years after the location of the said reservoir and its said ditch line, or within five years after the approval of the same by the Secretary of the Interior; and the Court further finds that five years since the filing and approval of the said articles of incorporation, proof of organization, maps and surveys of the said reservoir and ditch line of the defendants had long since lapsed prior to the filing of the said supplemental bill and that the defendants had not complied with the requirements of the Act of Congress, approved March 3, 1901, under which the same were filed but has failed to construct or complete within the period of five years after the location of the said canal and reservoir any part or section of the same.

("Wherefore, it is" not in record.)

Ordered, adjudged and decreed by the Court that the rights of the said defendants, or either of them, to so construct and complete, the said reservoir and said ditch, or any part thereof, under and by virtue of the said Act of Congress of March 3, 1901, be and the same are hereby declared to be forfeited.

It is further ordered, adjudged and decreed by the Court by reason of the premises that an injunction be, and the same is hereby granted against the said defendants, enjoining them from constructing or attempting to construct the said reservoir, or any part thereof, and that the same be made perpetual.

It is further ordered, adjudged and decreed by the Court that the plaintiff have and recover from the said defendants its costs to be taxed and that execution issue therefor.

(Signed) FRANK W. PARKER,
Associate Justice Supreme Court of New Mexico and
Judge of the Third Judicial District Thereof.

Dated May 21st, A. D. 1903.

80 Which said Decree is endorsed in words and figures following, to-wit:

In the District Court, Third Judicial District, Territory of New Mexico. United States of America, *vs.* Rio Grande Dam & Irrigation Company, *et al.* Decree. Filed in my office May 21, 1903. James P. Mitchell, Clerk.

And thereafter, on the 5th day of October, A. D. 1903, there was filed and entered of record in the office of the Clerk of this Court the Motion for leave to file amended decree, which said Motion is in words and figures as follows, to-wit:

In the District Court, Third Judicial District, Territory of New Mexico.

UNITED STATES OF AMERICA, Plaintiff,
vs.
RIO GRANDE DAM & IRRIGATION CO. ET AL., Defendants.

Motion for Leave to File Amended Decree.

Now comes the plaintiff, the United States of America, by W. B. Childers, its United States Attorney for the Territory of New Mexico, and respectfully represents that in the decree heretofore rendered in this cause on the 21st day of May, A. D. 1903, it is set forth that the Court finds "That five years since the filing and approval of the said articles of incorporation, proof or organization, maps and surveys of the said reservoir, and ditch line of the said defendants had long since lapsed prior to the filing of the said supplemental bill and that the defendants had not complied with the requirements of the Act of Congress, approved March 3, 1901, under which the same were filed."

And in and by said decree, it is ordered, adjudged and decreed "by the Court that the rights of the said defendants, or either of them, to construct and complete the said reservoir and said ditch, or
81 any part thereof, under and by virtue of the said Act of Congress of March 3, 1901, be and the same are hereby declared to be forfeited."

Plaintiff further represents that the designation of said Act of Congress as being approved "March 3, 1901," is a mistake and the same should have been designated as the Act of Congress approved March 3, 1891.

Wherefore, Plaintiff prays that this Court will enter a decree herein amending and modifying said decree so as to specify the Act of Congress approved March 3, 1891, instead of the "Act of Congress approved March 3, 1901," as in the decree in this cause set out, and that said decree when entered may be entered *nunc pro tunc* as of the 21st day of May, A. D. 1903.

(Signed) W. B. CHILDERS,
United States Attorney for the Territory of New Mexico.

Which said Motion is endorsed in words and figures following, to-wit:

1243. In the District Court, Third Judicial District, Territory of New Mexico. United States of America, *vs.* Rio Grande Dam & Irrigation Company, *et al.* Motion for leave to file amended decree. Filed in my office Oct. 5, 1903. James P. Mitchell, Clerk. W. B. Childers, United States Attorney.

And thereafter, on the 5th day of October, A. D. 1903, there was filed and entered of record in the office of the Clerk of this Court, the

Order granting said Motion above set forth, which is in words and figures as follows, to-wit:

In the District Court, Third Judicial District, Territory of New Mexico.

UNITED STATES OF AMERICA, Plaintiff,
vs.
RIO GRANDE DAM & IRRIGATION CO. ET AL., Defendants.

82 *Order.*

The petition of the United States of America, plaintiff in the above entitled cause, having this day been filed, praying for the entry of a decree changing and modifying the decree heretofore entered in this cause, in certain respects, it is ordered, adjudged and decreed that the decree hereto entered in this cause may be changed and modified so as to substitute in place thereof the Act of Congress approved March 3, 1891, instead of the "Act of Congress approved March 3, 1901" as set out in said decree; and the petition of said motion is hereby granted that said decree may be entered *nunc pro tunc*.

(Signed) FRANK W. PARKER,
Associate Justice of the Supreme Court of New Mexico, and Judge of the Third Judicial District Thereof.

Which said Order is endorsed in words and figures following, to-wit:

1243. In the District Court, Third Judicial District Territory of New Mexico. United States of America *vs.* Rio Grande Dam & Irrigation Company, *et al.* Order. Filed in my office Oct. 5, 1903. James P. Mitchell, Clerk.

And thereafter, on the 5th day of October, A. D. 1903, there was filed and entered of record in the office of the Clerk of this Court the Amended Decree, which is in words and figures following, to-wit:

In the District Court, Third Judicial District, Territory of New Mexico.

UNITED STATES OF AMERICA, Plaintiff,
vs.
RIO GRANDE DAM & IRRIGATION CO. ET AL., Defendants.

83 *Decree.*

This cause coming on to be heard upon the Motion of the United States by its United States Attorney for the Territory of New Mexico, W. B. Childers, Esq., praying that the decree entered in this cause on the 21st day of May, A. D. 1903, may be modified and amended,

and the Court having granted leave for the filing of such petition and ordered that said decree may be modified and amended as prayed for, and it appearing to the Court that a supplemental bill was filed herein, by its leave, on the seventh day of April, A. D. 1903, and that copies of the said supplemental bill were served more than thirty days past upon the attorneys of record of the defendants in said cause, and it further appearing from the certificate of the Clerk of said Court that no demurrer, answer or other pleading has been filed to said supplemental bill by the defendants in said cause, and the Court being fully informed in the premises, the Court does find that the allegations of said supplemental bill are confessed and are true; and further especially finds that the articles of incorporation and the map, survey of the reservoir of the defendant corporation, the Rio Grande Dam & Irrigation Company, were filed with the Secretary of the Interior prior to the twenty-sixth day of June, A. D. 1897, and were prior to said date approved by the Secretary of the Interior; and it further finds that the said defendants have not completed its said reservoir or said ditch, or any section thereof, within five years after the location of the said reservoir and its said ditch line, or within five years after the approval of the same by the Secretary of the Interior; and the Court further finds that five years since the filing and approval of the said articles of incorporation, proof of organization, maps and surveys of the said reservoir and ditch line of the said defendants had long since lapsed prior to the filing of the said supplemental bill and that the defendants had not complied with the requirements of the Act of Congress approved March 3, 1891, under which the same were filed but has failed to construct or complete within the period of five years after the location of the said canal and reservoir any part or section of the same.

84 Wherefore, it is ordered, adjudged and decreed by the Court that the rights of the said defendants, or either of them, to construct and complete the said reservoir and said ditch, or any part thereof, under and by virtue of the said Act of Congress of March 3, 1891, be and the same are hereby declared to be forfeited.

It is further ordered, adjudged and decreed, by the Court, by reason of the premises that an injunction be, and the same is hereby granted against the said defendants, enjoining them from constructing or attempting to construct the said reservoir, or any part thereof, and that the same be made perpetual.

It is further ordered, adjudged and decreed by the Court that the plaintiff have and recover from the said defendants its costs to be taxed, and that execution issue therefor.

It is further ordered, adjudged and decreed by the Court that this amended and modified decree shall be entered *nunc pro tunc* as of the 21st day of May, A. D. 1903.

(Signed) FRANK W. PARKER,
Associate Justice of the Supreme Court of New Mexico and Judge of the Third Judicial District Thereof.

Dated October 5th, A. D. 1903.

Which said Decree is endorsed in words and figures following, to-wit:

#1243. In the District Court, Third Judicial District, Territory of New Mexico. United States of America *vs.* Rio Grande Dam & Irrigation Company *et al.* Amended decree. Filed in my office Oct. 5, 1903. James P. Mitchell, Clerk.

Charged.

Recorded.

And thereafter, on the 31st day of October, A. D. 1903, there was filed and entered of record in the office of the Clerk of this
85 Court the Motion to open Default, which said motion is in words and figures as follows, to-wit:

In the District Court, Third Judicial District, Territory of New Mexico.

No. 1243.

UNITED STATES OF AMERICA, Plaintiff,

vs.

RIO GRANDE DAM AND IRRIGATION COMPANY ET AL., Defendants.

Motion, Together with Affidavits and Records in Support Thereof.

Now come the defendants, to-wit, the Rio Grande, Dam and Irrigation Company, and the Rio Grande Irrigation and Land Company, Limited in the above entitled cause and move the court to vacate and set aside the order in this cause entered herein on the 7th day of April, 1903, at Las Cruces, Dona Ana County, New Mexico, which said order granted to the plaintiff herein the privilege and right to file a supplemental bill of complaint in this cause, and that the court granting said motion give leave to the defendants herein to oppose said motion for leave to file said supplemental bill of complaint, and to permit the defendants to have a hearing herein, and to give their reasons why said leave to file said supplemental bill of complaint should be denied by this court; and that the order granting to plaintiff herein the privilege and right to file said supplemental bill of complaint be vacated and set aside, upon the ground that the court had no power to permit the plaintiff to file said supplemental bill in this cause, in this to wit, that the cause of action sought to be made the basis of the suit by supplemental bill arose during the pendency of the case and that said alleged cause of action is consistent with and irreconci-able with the cause of action alleged in the original and amended bill in said cause, and upon the further ground that said cause of action alleged in the supplemental bill is a separate and distinct cause of action and arose since the beginning of the suit, and after rights had become fixed and vested in said defendants; and that said defendants be permitted to have the — issued in said cause restored as said issues were framed by the original and amended bills of complaint filed herein on the 19th day of June, 1897, said date

being the date of filing said amended bill, and to which original and amended bill of complaint, the defendants herein on the 27th day of June, 1897, filed their plea and their joint and several answer, and to which the plaintiff thereafter filed its replication, and that said defendants' default upon said motion of plaintiff to file said supplemental bill of complaint be relieved and opened, and said defendants be permitted in this court after the opening of said default to oppose and resist the granting of said motion to file said supplemental bill of complaint, and that the decree entered in this cause in the office of the clerk of this court upon defendants' default in answering said supplemental bill of complaint be vacated and set aside, and declared to be of no effect; and that the amended decree in this cause filed in this court on the 5th day of October, 1903, upon said plaintiff's application, be vacated and set aside and held of no effect, said decree having been granted upon defendants' default to answer said supplemental bill of complaint, this court having no power to grant said decree, and that the defendants herein should this court not determine to relieve said defendants from their default upon said motion of plaintiff to file said supplemental bill of complaint, be permitted to come in and answer said supplemental
86 bill of complaint and present their issue on the merits of said supplemental bill of complaint, and relieve the defendants from their default therein, and that said defendants may have such other and further order and relief as to this court may seem just and equitable.

This motion is made upon the original and amended bill of complaint of the plaintiff herein, of the plea and answer of the defendants thereto, of the records and proceedings in this cause and said supplemental bill and all of which are matters of record herein and to which the defendant will refer upon the hearing and determination of this motion, and defendants will use said papers and records on this motion, and also the affidavits of Doctor Nathan E. Boyd hereto annexed and the affidavit of Mr. Allen W. Ellington, and also the proposed answer of said supplemental bill hereto annexed.

(Signed) KLOCK & OWEN,
Attorneys for Defendants,
Albuquerque, New Mexico.

In the District Court, Third Judicial District, Territory of New Mexico.

No. 1243.

THE UNITED STATES OF AMERICA
vs.
THE RIO GRANDE DAM AND IRRIGATION COMPANY ET AL.

Affidavit in Support of Motion.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

Nathan E. Boyd, being duly sworn, deposes and says:

That the Rio Grande Dam and Irrigation Company named as one of the defendants in the foregoing entitled cause is a corporation duly organized and incorporated under and by virtue of the laws of the Territory of New Mexico; that the principal place of business of said Rio Grande Dam and Irrigation Company is at Las Cruces, Dona Ana County, said Territory; That the Rio Grande Irrigation and Land Company, Limited, also named as a defendant in the above cause, a foreign corporation, organized under the laws of the Dominion of Great Britain; Deponent further say*d* that he is a director of the defendant corporation, the Rio Grande Dam and Irrigation Company, and has been such director since shortly after the incoⁿporation of said Company defendant; that deponent is the duly appointed receiver of the holders of the debentures of the Rio Grande Irrigation and Land Company, Limited, the defendant corporation aforesaid; deponent further says that since the incorporation of the Rio Grande Dam and Irrigation Company, defendant aforesaid, he has had practically the entire charge and control of the affairs of said company, and the conduct of the business of said Company, its purposes, plans and contracts have all been under the direction of this deponent; that deponent has maintained by great financial aid, and otherwise, the status of said Company since its incorporation; that the objects of the incorporation of said companies defendant are particularly set forth in the articles of incorporation of said companies, and which are substantially restated in the pleadings in this action hitherto filed herein, and deponent refers to said pleadings and to said articles of incorporation also filed, and makes the same a part of this application and of this affidavit; Deponent further says that within a very short time after the
87 incorporation of the Rio Grande Dam and Irrigation Company, it began the making of surveys and plans for its work and to carry out the purposes of its said incorporation, and thereafter the Government of the United States by its proper department, The Secretary of the Interior, and the Department thereof, granted the said Company concessions, rights, immunities, & privileges and confirmed all of the said defendant's rights and movements in the premises, and gave its consent to the inauguration of said work,

its construction and completion; and that thereafter said defendant Company engaged in the construction and prosecution of its said plans, contract, and work, and laid out and expended large sums of money appertaining thereto; that deponent personally furnished and expended in said enterprise the bulk of the capital to carry on the same, to wit, at least the sum of one hundred and sixty thousand dollars, and all of which with considerable other sums were laid out in behalf of the enterprise of which defendant the Rio Grande Dam and Irrigation Company in constructing its irrigation works in part of Dona Ana County, New Mexico.

That said defendant, the Rio Grande Dam and Irrigation Company began its said construction of said irrigation works in the year of 1896, and prosecuted the same employing a large number of men therefor and layed out and expended large sums of money therein until said defendant was restrained by the plaintiff in this action by temporary injunction issued and granted upon its original bill filed herein on the 25 day of May, 1897; that said plaintiff in and by its said original bill contended that the said enterprise so inaugurated by the defendant the Rio Grande Dam and Irrigation Company interfered with the alleged navigability of the Rio Grande in New Mexico and in and by said bill of complaint the plaintiff prayed an injunction restraining the prosecution of said work, which said injunction was granted, and in consequence of said injunction the work of construction was suspended be said defendant company; that thereafter the United States served its amended bill of complaint in said action in which it demanded the same substantial relief as in its original bill joining the Rio Grande Irrigation and Land Company, Limited as a defendant; that in and by said amended bill the complainant prayed a temporary injunction restraining the further prosecution of said work by said Rio Grande Land and Irrigation Company and as a part of the relief sought a permanent injunction restraining the resumption of said work on the part of the named defendants; that because of said injunction work upon said irrigation enterprise was suspended; that the defendants in season made and filed their joint and several answers to said amended bill of complaint; that in and by said defendants' answer they took issue with each and every allegation of fact and conclusion of law raised and set forth in said amended bill of complaint; that said defendants also by their joint and several answers alleged and set forth new matter as reasons against granting the relief prayed for in said complainants' bill; that deponent refers to the pleadings, injunction order, affidavits, upon which the said injunction order was granted, and all papers relating thereto and filed herein and makes the same a part of this application, said papers being of record in this cause and to which said papers the complainant herein by its proper officers and agents is familiar:

Deponent further says that after issue joined as aforesaid said cause came on for trial in the District Court of the Third Judicial District of the Territory of New Mexico, and after due hearing had therein, said court dismissed the bill of complainant upon the merits, and made its proper findings thereon upon the new matter alleged

and set forth in said defendants' answer said findings being matters of fact and conclusions of law; that the complainant thereafter appealed from the judgment and decree of said district court to the Supreme Court of the Territory of New Mexico, and said last mentioned court after due deliberation had thereon affirmed in all things the judgment of the said District Court; that the complainant then appealed to the United States Supreme Court, and the last mentioned court reversed the decision of the Supreme Court of the Territory of New Mexico and remanded said cause with instructions to set
88 aside the decree of dismissal and to order an inquiry into the question whether the intended acts of the defendants in the construction of the dams and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability, and if so to enter a decree restraining those acts to the extent that they will so diminish; Deponent refers to the opinion of the Supreme Court of the United States in said cause and to its direction and order in the premises and makes the same a part hereof.

Deponent further says that thereafter such proceedings were had that said cause came on for hearing in the Third Judicial District Court of the Territory of New Mexico wherein said cause originated, and after due trial and due deliberation had thereon, the District Court dismissed the bill of the complainant upon the merits, and made its proper findings of facts and conclusions of law thereon, and upon the new matter alleged and set forth in said defendants' answer in said cause; that deponent refers to the decision and findings of fact and conclusions of law by the said District Court and the decree entered therein now matters of record herein, and deponent makes all of said proceedings and papers a part of this application: That the complainant thereafter appealed from the judgment and decree of said District Court to the Supreme Court of the Territory of New Mexico, and said last mentioned court after argument and due deliberation had thereon affirmed in all things the judgment of the said District Court, and deponent refers to the proceedings of the Supreme Court of the Territory of New Mexico, and makes the same a part of this application: That thereafter the complainant appealed to the United States Supreme Court, and the last mentioned court reversed the decision of the Supreme Court of the Territory of New Mexico and again remanded the said cause to the Supreme Court of the Territory of New Mexico with directions to reverse the decree of the District Court, and to remand the case with directions to grant leave to both sides to adduce further evidence.

Deponent further says that the privilege to adduce said additional evidence granted by said court to both sides was solely and exclusively upon the one proposition in said case, to wit: whether the intended acts of the defendant in the construction of the dam and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability, and if so to enter a decree restraining those acts to the extent that they will so diminish: Deponent refers to the proceedings of the Supreme Court of the United States upon said hearing and its

conclusion and order therein, with the reasons for its said conclusion and makes all of the same a part hereof;

Deponent further says that after the reversal of said cause as last mentioned above, the Territory of New Mexico applied by a petition of its Solicitor General to intervene therein for and on behalf of the said Territory and by its prayer sought to be made a co-defendant in said action in said cause; that said petition for intervention was presented to the Third Judicial District Court and deponent refers to said petition for intervention which is a matter of record, and makes the same a part hereof.

Deponent further says that the attorneys and solicitors for defendants in this cause in the District and Territorial Supreme Courts of New Mexico, were as follows: W. A. Hawkins, S. B. Newcomb and Albert B. Fall, and all of whom as deponent is informed and verily believes reside in this Territory and were the attorneys and solicitors of record in said cause; deponent further says that J. H. McGowan represented the defendants and appellees in both of said appeals before the Supreme Court of the United States; that said McGowan at said time and now resides in the City of Washington, in the District of Columbia; that S. B. Newcomb one of the solicitors and attorneys of record for defendants departed this life more than one year since.

Deponent further says that said W. A. Hawkins and A. B. Fall the surviving solicitors and attorneys of record for defendants in said cause in the Territory of New Mexico, gave to said defendants no notice whatever of the application to the court by the complainant herein for leave to file its supplemental bill, and that deponent received no notice from said solicitors and attorneys for defend-
89 ants that an application would be made by said complainant for leave to file said supplemental bill; that deponent represented said defendants in all things pertaining to the aforesaid litigation, and said solicitors and attorneys aforesaid had full knowledge that this deponent was the business representative of said defendants, and that the deponent had the direction and charge of said litigation from its inception, and that said solicitors and attorneys recognized deponent as the official representative of said defendants in all of said litigation from its inception; deponent further says that it appears from the records in this cause that on the 7th day of April, 1903, the complainant herein applied to the Third Judicial District Court to file its supplemental bill herein; that the defendants had no notice of said application and motion so made in behalf of complainant; that after the seventh day of April, 1903, this deponent while at Philadelphia, Pennsylvania, received from J. H. McGowan by mail what purported to be a proposed supplemental bill of complaint in behalf of complainant; that as deponent recollects said supplemental bill so received as aforesaid was substantially a copy of the supplemental bill filed herein April 7th, 1903; that said supplemental bill so received by deponent from said McGowan came to him without comment and without any suggestions from said McGowan that said supplemental bill required an answer to be made thereto by the said defendants, and this deponent understood from reading said supplemental bill so sent to him by said McGowan aforesaid that the same

was merely to be used upon an application by complainant to file same; deponent not understanding that an order for the filing of said supplemental bill had been made by the court and that the said supplemental bill stood as a pleading in the cause and which required an answer by said defendants; that this deponent relied upon the prayer for judgment as found upon the fifth page of said supplemental bill, paragraph 5, and which is in the language and figures following, to wit:

"Wherefore plaintiff prays to be permitted to file this sup-lemental bill of complaint and that the same be considered upon the hearing of this cause and that the defendants be decreed to have forfeited all the rights they may have had or claimed under and by virtue of said act of March 3rd, 1891, not hereby admitting however that the defendant ever acquired any rights under and by virtue of said act."

Deponent further says that he fully believed upon reading said supplemental bill that the application for the filing thereof was still undetermined, and that the Court had not granted said application, and that the Court would refuse to grant said application as the said cause had theretofore been heard upon the original pleading in said cause separate and apart from the new matter and new cause of action alleged and set forth in said supplemental bill.

And deponent further believed that from the decision of the United States Supreme Court last rendered herein that the said cause was remanded for the sole purpose only of adducing additional proof upon the subject specifically herein set forth.

Deponent further says that all notices in any wise relating to said motion for leave to file said supplemental bill of complaint should have been made to this deponent by the local solicitors and attorneys as they well knew that this deponent advised and directed in all things in said action of said defendants and in their behalf. Deponent further says that at the time he received from said McGowan said proposed supplemental bill this deponent"s wife was very ill, confined to her bed in the City of Philadelphia, Pennsylvania, and her physical condition was so critical that deponent's attention and presence were unremittingly required in her behalf; that it was absolutely impossible at said time for this deponent to take up business matters however urgent in kind or character and of whatever magnitude; that deponent's said wife remained in such critical condition for many weeks after he had received from said McGowan what deponent believed was complainant's proposed supplemental bill; this deponent further says however that he had no knowledge of any kind and character upon receiving said proposed supplemental
90 bill that any action was required of him in the premises, deponent fully believing that said complainant had merely made an application to file said supplemental bill and that said application was then und-termined and should the same be granted by the court that deponent would be further advised in the premises and would then direct the proposed answers of said defendants to said supplemental bill:

Deponent further says that said defendants and this deponent remained in total ignorance that said supplemental bill had been filed

by the complainant and stood as a pleading in the case and that defendants were in default in answering the same until the 19th day of October, 1903; that late in the evening of the 14th day of October, this deponent arrived in Albuquerque, New Mexico, and being his first presence in said Territory for at least two years last past; that deponent came to said Territory mentioned on this occasion responding to the invitation of the Committee of the Territorial Irrigation Convention for the purpose of delivering an address upon the subjects to be discussed and inquired into by said convention, and deponent did address such convention on the 15th day of October, 1903, and in said address before said convention deponent discussed in extenso the features and status of the litigation in this cause and of the relative standing of the parties thereto, this deponent being unmindful at the time that the defendants were in default of an answer to said supplemental bill, or that the said supplemental bill stood on the record as a pleading in the cause, and that a decree by default had been entered thereon against these defendants.

Deponent further says that he knew William B. Childers to be the United States Attorney for the Territory of New Mexico, and that as said United States Attorney had charge of the case of the complainant herein; said Childers representing the complainant in the courts of the Territory but not in the Supreme Court of the United States. That deponent being advised as to the rule of the Supreme Court of the United States reversing and remanding said cause for the sole purpose of adducing the proofs heretofore mentioned, on the 19th day of October, 1903, called upon said William B. Childers, Esq., at his office in the City of Albuquerque for the purpose of making inquiry of him as to the time said cause could be brought to a hearing upon the issue as made by the Supreme Court of the United States in remanding and reversing this cause, and at said interview by deponent with said Childers deponent was advised by said Childers that the Government had entered a decree by default upon its supplemental bill of complaint, and by the terms of said decree the rights of said defendant were adjudged forfeited in all things, and that said defendant were perpetually enjoined from the completion of said irrigation work in any manner whatever; Deponent further says that on said 19th day of November, 1903, he received the first intimation that said decree had been entered as aforesaid and that the same was made known to deponent by said Childers and not otherwise.

Deponent further says that immediately in behalf of said defendants he communicated with the Clerk of the Third Judicial District Court of the Territory of New Mexico to verify the information he had received from said Childers, and to procure the records of said court relating thereto; and since which time deponent has been engaged in making this application on behalf of said defendants for relief from their default in opposing said motion granting complainant the right to file said supplemental bill and of said defendants' default in answering said supplemental bill.

Deponent further says that should decree be allowed to remain and be in full force and effect the defendant, the Rio Grande Dam

and Irrigation Company is irretrievable ruined, and its stock made worthless and very great loss will result to its stockholders; that the very large amount of money hitherto expended by said defendant company in good faith and upon the concession of the Interior Department of the United States will be entirely lost and wasted, and this by the direct action of the United States Government in seeking to overrule and set aside the solemn action of one of its departments, and which was the inducement for such expenditure of money on the part of said defendant company, and of the magnitude of its proposed work in the premises; that the prosecution and con-
91 tinuance of the work outlined by said defendant company was restrained and stayed solely by the action of the complainant; that otherwise it is deponent's belief that the said work would have been completed many years since and good, incalculable in amount would have been rendered to the people and dwellers in the Rio Grande Valley in Southern New Mexico.

Deponent refers to the decree made and entered herein on the 21st day of May, 1903, and the decree as amended herein on the 5th day of October, 1903, both of which are filed in the office of the clerk of the District Court and deponent makes the same a part of this his application; deponent further says that said defendants had no notice whatever of said original and said amended decree until this deponent received copies thereof on the 19th day of October, 1903.

Deponent further says that as an officer of the defendant the Rio Grande Dam and Irrigation Company in the above entitled action, and *is* the receiver of the holders of the debentures of the Rio Grande Irrigation and Land Company limited, and as this deponent has had full charge and direction of the cause in question from its inception to this time, and has full authority in the premises, deponent has full*u* and fairly stated the case in said action to Harry P. Owen, who is a counsellor, attorney and solicitor of this Court, and defendant's counsel for the purposes of this motion, and who is also a member of the firm of Klock & Owen, said firm residing and doing business at Albuquerque, in said Territory, and that said defendants have a good and substantial defense upon the merits of said action, and upon the merits of said supplemental bill of complaint as deponent is advised by defendants' counsel as aforesaid after such statement made as aforesaid, and as deponent verily believes.

Deponent further prays that *the defendants'* defaults as hereinbefore set forth be opened and set aside, and that defendants be relieved from the consequences of said defaults; that said defendants be permitted to appear and contest the right of said complainant to file said supplemental bill of complaint, and to ask this court to exercise its discretion adversely to said complainant in this behalf; that the defendants' default in pleading to said supplemental complaint be opened and the defendants relieved from the consequences thereof, and said defendants be permitted to serve their proposed answer to said supplemental bill of complaint and which said answer is verified and hereto annexed and made a part hereof.

That the decrees entered herein by the complainant in default of

said defendants' answer be vacated and set aside, and that said complainant be enjoined and restrained from enforcing said decrees until the hearing and determination of this application.

(Signed) NATHAN BOYD.

Subscribed and sworn to before the undersigned on this the 28th day of October, 1903.

[SEAL.] (Signed) HARRY P. OWEN,
Notary Public.

92 In the District Court, Third Judicial District, Territory of New Mexico.

No. 1243.

UNITED STATES OF AMERICA, Plaintiff,
vs.
RIO GRANDE DAM AND IRRIGATION COMPANY ET AL.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

Nathan E. Boyd being duly sworn deposes and says that he is the same person who subscribed and verified the affidavit on this date and which is annexed to the motion herein; that deponent is by birth a citizen of the United States; that deponent has fully and fairly stated the case in said action to Messrs. Klock & Owen, who are counsellors, solicitors and attorneys of this court and the counsel for the defendants herein; and deponent has been advised by each of the members of said firm that said defendants have a substantial defense upon the merits of said action and upon the merits of said supplemental bill of complaint as deponent is advised by defendants' counsel as aforesaid and each of them after such statement made as aforesaid and as deponent verily believes; that deponent is an officer of the defendant the Rio Grande Dam and Irrigation Company in the above entitled action, and is the receiver of the holders of the debentures of the Rio Grande Irrigation and Land Company, Limited, and deponent has had full charge and direction of this cause from its inception to this time, and has been authorized by said defendants to seek the relief applied for herein; that deponent after such statement of said cause to his said attorneys and counsellors aforesaid has been advised by them that said plaintiff had not the right to make and file the supplemental bill herein and that the court was without power in the premises, which said deponent verily believes after such statement made as aforesaid to said attorneys and counsellors as aforesaid; that the order permitting the plaintiff to file said supplemental bill herein was made in the Third Judicial District Court the presiding Judge thereof being Honorable Frank W. Parker, and the supplemental bill was filed in said court and the decree thereon in the office of the clerk of said third judicial district court.

(Signed) NATHAN BOYD.

Subscribed and sworn to before the undersigned on this 28th day of October, 1903.

[SEAL.] (Signed) HARRY P. OWEN,
Notary Public.

In the District Court, Third Judicial District, Territory of New Mexico.

No. 1243.

THE UNITED STATES OF AMERICA
vs.
THE RIO GRANDE DAM & IRRIGATION COMPANY.

Affidavit in Support of Motion.

93 First. These defendants now and at all times hereafter, saving unto themselves all, and all manner of benefits or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said supplemental bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material and necessary for them to make answer thereto, and now answering say:

Second. These defendants admit that on the 19th day of June, 1897, the plaintiff filed its amended bill in chancery in this cause, therein praying for the relief prayed for in the original bill theretofore filed, and in any by said amended bill a new party defendant was added in said action to wit, The Rio Grande Land and Irrigation Company, Limited.

Third. The defendants further answering said supplemental bill admit that by the said amended bill of complaint it was among other things alleged therein that the said defendants proposed to construct, were constructing, or about to construct a dam in the Rio Grande at a point called Elephant Butte in the Territory of New Mexico, and in the Third Judicial District thereof, said Elephant Butte being about one hundred and twenty-five miles above the City of El Paso, for the purpose of creating a reservoir and diverting the waters of said river into ditches and canals and using the same for irrigation and other purposes.

Fourth. The defendants further answering said supplemental bill admit, that said amended bill further alleged that the navigability of the said Rio Grande at the City of El Paso, in the State of Texas, had been recognized and acknowledged by Congress and the Secretary of War, and the impounding of the waters of said river at the point aforesaid by the defendants would so deplete and prevent the flow of the water through the channel of said river below said dam as to seriously obstruct the navigable capacity of said river from said point to its mouth.

Fifth. The defendants further answering said supplemental bill admit, that said amended bill further alleged that the construction of said dam had never been affirmatively authorized by law, and the

plans and specifications for the construction of the same had
94 not been submitted to the Secretary of War for his approval, and that the location and plans had not been submitted and approved by him, and that said dam could not be lawfully constructed until the same had been affirmatively authorized by law and had been submitted to and approved by the Secretary of War.

Sixth. The defendants further answering said supplemental bill admit that said amended bill, among other things, prayed for an injunction restraining the defendant from beginning and commencing, or attempting to construct or build said dam and reservoir and for general relief.

Seventh. The defendants further answering said supplemental bill admit that said defendants filed a plea to said amended bill and in which said plea so filed by defendants was the allegation set forth at length of the supplemental bill of the complainant herein.

Eighth. The defendants further answering said supplemental bill, admit that upon the issues raised by said bill & the plea and the answer of said defendants filed in said cause, The District Court heard said cause and rendered a decree dismissing the plaintiff's bill of complaint, upon the merits, that from this decree the plaintiff appealed to the Supreme Court of the Territory, which last mentioned court affirmed the decree of the District Court, and that from the decree of the Supreme Court of the Territory, the plaintiff appealed to the Supreme Court of the United States, and that the last mentioned court reversed the Supreme Court of the Territory and remanded said cause to the Supreme Court of the Territory, with instructions to said last mentioned court to enter a decree reversing the District Court and remanding the cause to the last mentioned court to take proofs upon the question as said mandate directed.

Ninth. The defendants further answering said supplemental bill deny that the Supreme Court of the United States in reversing said cause and remanding the same to the Supreme Court of the Territory gave instructions to said Supreme Court of the Territory to enter a decree reversing the District Court, and remanding the cause to that court to take proofs to determine in effect to what extent the Rio Grande was navigable.

95 Tenth. The defendants further answering said supplemental bill deny that the Supreme Court of the United States in reversing the decree of the Supreme Court of the Territory, and remanding said cause, gave instructions to the Supreme Court of the Territory to enter a decree reversing the District Court, and remanding the cause to that court to take proof to determine to what extent the construction of said dam would impair the navigability of the said Rio Grande.

Eleventh. The defendants further answering said supplemental bill deny that they have any knowledge or information sufficient to form a belief that the Supreme Court of the Territory remanded said cause, with instructions in accordance with the mandate of the Supreme Court of the United States.

Twelfth. The defendants further answering said supplemental bill admit that after said first decree of reversal by the Supreme Court of

the United States of the Supreme Court of the Territory, and remanding said cause to the latter court, and which was thereafter remanded by said court to the District Court, that the District Court proceeded to take proofs in said cause and made findings of fact, and thereafter plaintiff asked leave to reopen said cause and to be permitted to offer additional testimony, which motion was overruled and the said cause dismissed, and from this decree the plaintiff again appealed to the Supreme Court of the Territory, and on hearing of this appeal, this decree of the District Court was affirmed by the Supreme Court of the Territory, and that thereupon the plaintiff appealed from this second decree of affirmance by the Supreme Court of the Territory to the Supreme Court of the United States, and that the decree of the Supreme Court of the Territory was a second time reversed, and said cause again remanded to the Supreme Court of the Territory, with instructions to enter a decree of reversal and to remand the cause to the District Court.

Thirteenth. The defendants further answering said supplemental bill deny that the Supreme Court of the United States in reversing said cause, and remanding the same to the Supreme Court of the Territory, gave instructions to said Supreme Court of the Territory to enter a decree reversing the District Court, and remanding
96 the cause to that court with directions to reopen the cause, and permit additional proofs to be offered, but defendant alleges that the Supreme Court of the United States in reversing said cause and remanding the same to the Supreme Court of the Territory gave instructions to said Supreme Court of the Territory to enter a decree reversing the District Court and remand the said cause to that court with instructions to order "an inquiry into the question whether the intended acts of the defendant in the construction of a dam and appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability, and if so to enter a decree restraining those acts to the extent that they will so diminish."

Fourteenth. The defendants further answering said supplemental bill deny any knowledge or information sufficient to form a belief that the Supreme Court of the Territory of New Mexico made its order remanding said cause to the District Court in accordance with the mandate of the Supreme Court of the United States.

Fifteenth. The defendants further answering said supplemental bill deny any knowledge or information sufficient to form a belief that the proceddings alleged by plaintiff in said supplemental bill have been had and that the cause stands upon the docket of the District Court for hearing and decree.

Sixteenth. The defendants further answering said supplemental bill deny that the rights of said defendants to sonctruct said canal, ditch and reservoir, and to complete said work have been forfeited under the act of Congress of March 3rd, 1891, as alleged in the Third Paragraph of said supplemental bill of complaint.

Seventeenth. The defendants further answering said supplemental bill deny that during all of the time except from May 24, 1897, to ——— —, 1897, that said defendants have been in no wise hindered

restrained or prevented from complying with the provisions of said act by any judicial order of process whatsoever.

Eighteenth. Defendants further answering said supple-
97 mental bill deny the fourth allegation therein contained and each and every part thereof.

Nineteenth. Defendants further answering said supplemental bill and as a defense thereto allege that the defendant, Rio Grande Dam and Irrigation Company is a duly organized corporation residing and doing business under the laws of the Territory of New Mexico, and has fully complied with all the laws of said Territory relating to the construction of dams and reservoirs and the diversion and impounding of waters of public streams of said territory, and that having complied with said laws and the public acts of legislation relative thereto the said defendant is authorized thereunder to construct its dams and reservoirs in the Rio Grande River in said Territory, and divert and impound the waters thereof, and the defendants further say that the said Rio Grande Dam and Irrigation Company having first complied with the local laws, rules and regulations made and filed its articles of incorporation and the legal proofs of its organization with the Secretary of the Interior, & the department of the Interior being the legally constituted department of the United States Government for the filing and reception of said papers, and defendant made its application for its dam and reservoir at Elephant Butte the construction of which is hereby sought to be prevented and despoiled by the allegations in and the demand for relief in said supplemental bill; that defendant duly made its application for said dam and reservoir at Elephant Butte and for the construction thereof before the land office of the United States at Las Cruces, New Mexico, and that defendants said application and the map, outline and survey of such dam and reservoirs was prior hereto and prior to the filing of the amended bill of complaint and supplemental bill herein been approved by the Secretary of the Interior of the United States, the proper officer to give such approval, and is yet so approved in all things, and the construction of said dam and reservoir, duly authorized under the provisions of an act of congress passed and approved March 3, 1891, under which said act application for, such right to construct such dam and reservoir was duly made, conceded and approved as aforesaid.

98 Twentieth. Defendants further answering said supplemental bill and as a defense thereto allege that said defendant the Rio Grande Dam and Irrigation Company began work under the right and concession aforesaid and began the construction of said irrigation works at the point aforesaid and in and about the construction of such irrigation works laid out and expended large sums of money in the prosecution of said enterprise, said defendant relying implicitly upon the concession granted unto it as aforesaid.

Twenty-first. Defendants further allege and answering said supplemental complaint and by way of defense thereto that after said irrigation work was well under way and on the 19th day of June, 1897, the plaintiff herein filed its amended bill in chancery in said cause and in said bill praying for the relief prayed for in the original bill

filed in said cause, and in and by said amended bill the defendant among other things demanded as follows:

"Wherefore, the complainant being remediless except in a court of equity where such matters are remedial, the complainant prays that a subpœna in chancery be directed to said defendant the Rio Grande Dam and Irrigation Company and the Rio Grande Irrigation and Land Company, Limited, requiring them to be and appear before this Honorable Court at a time and place to be therein named to answer all and singular the premises, but not under oath, (answers under oath being hereby expressly waived) and that the said defendant the Rio Grande Dam and Irrigation Company and the Rio Grande Irrigation and Land Company, Limited, may be restrained from beginning and commencing or attempting to construct or build said dam and reservoirs, or any one of them, breakwater, reservoir or other structure or obstruction of any character whatsoever, across the Rio Grande or the waters thereof, or from maintaining such dam or obstruction in the Territory of New Mexico and especially at Elephant Butte in said Territory or any other point on said river in said Territory of New Mexico as shall affect the navigable capacity of said Rio Grande at any point through its course, whether in the Territory of New Mexico or elsewhere, and that the temporary injunction heretofore granted against said original defendant be continued, and the complainant prays that it shall have such other and further relief in the premises as equity may require and to your honor may seem meet." Plaintiff further prays that a temporary injunction to be issued and directed to the said defendant the Rio Grande Dam and Irrigation Company and the Rio Grande Irrigation and Land Company, Limited, restraining and enjoining them and each of them from beginning, commencing and attempting to construct or build said dam or reservoir or any other dam, breakwater, reservoir or other structure or obstruction of any character whatsoever across the Rio Grande or the waters thereof or from maintaining such dam or obstruction in the Territory of New Mexico, and especially at Elephant Butte in said Territory, or any other point on the line of said river in said Territory of New Mexico, as shall affect the navigable capacity of said Rio Grande at the further orders of this Honorable Court, and that upon the final hearing of this cause the said injunction shall be perpetual."

99 Twenty-second. Defendants further answering said supplemental bill and by way of defense thereto allege that by the said amended bill of complaint and preceding the demand for relief as hereinabove set forth, among other things alleged that the said defendant corporations propose to construct and were constructing or about to construct a dam in the Rio Grande at a point called Elephant Butte in the Territory of New Mexico, and in the Third Judicial District thereof, said Elephant Butte being about 125 miles above the City of El Paso in the State of Texas for the purpose of creating a reservoir, and diverting the waters of said river into ditches and canals and using the same for irrigation and other purposes, and further alleged that the navigability of the said Rio Grande at the City of El Paso in the State of Texas has been recognized and

acknowledged by the Congress of the United States and the Secretary of War and that the impounding of the waters of the said River at said point by the construction of said dam and reservoir would so deplete and prevent the flow of the water through the channel of said river below said dam as to seriously obstruct the navigable capacity of the said river throughout its entire course from said point at Elephant Butte to its mouth.

Twenty-third. Said amended bill further alleged that the construction of said dam had never been affirmatively authorized by law, and the plans and specifications for the construction of the same had not been submitted to the Secretary of War for his approval, and that the location and plans had not been submitted and approved by him, and that no dam or other obstruction to the navigable capacity of any waters could be lawfully constructed until the same had first been affirmatively authorized by law and plans for such obstruction had been submitted and approved by the Secretary of War.

Twenty-fourth. Defendants further*ing* answering said supplemental bill and by way of defense thereto allege that on the 25th day of May 1897, complying with the prayer of said amended bill an injunction order was granted and served upon the defendant the Rio Grande Dam and Irrigation Company, said injunction commanding the said defendant, the Rio Grande Dam and Irrigation Company, its employees, or agents or any one under its au-
100 thority and each and every one of them under the penalty of the law thence ensuing that it and every one of them do absolutely desist and refrain from beginning, commencing, attempting, building, constructing, creating or maintaining any dam, breakwater, weir, structure or obstruction of any character whatsoever across the Rio Grande River in the waters thereof, in the Territory of New Mexico, and especially at Elephant Butte or at any point thereon in said judicial district, or in any manner to begin the construction of, or to construct or create any structure dam or other obstruction of any character whatsoever in such a manner and to such extent as shall affect the navigable capacity of said Rio Grande River.

Twenty-fifth. Defendants further answering said supplemental bill and by way of defense thereto allege that thereafter and on the 26th day*n* of June, 1897, they filed their plea and answer to said amended bill in and by which said plea and answer they put in issue all of the material allegations of said amended bill of plaintiff's and further by said plea and answer set up as a defense to said action that the defendant the Rio Grande Dam and Irrigation Company had fully complied with all the requirements of the act of congress approved March 3, 1891, and had acquired a right to construct said dam and divert said water by reason of compliance with the terms of said act, and that all of said defendants' actions and proce*d*dings in this behalf were regular and lawful & defendants reallege the allegations of said plea and answer. Defendants refer to said plea and answer so filed by them in said cause on the 26th day of June, 1897, and make the same a part hereof, said plea and answer being records in said cause and upon the files of the Clerk of the District Court.

Twenty-sixth. Defendants further answering said supplemental bill and by way of defense thereto allege that upon the issues joined by said amended bill and by the defendants plea and answer thereto and the complainants replication the district court heard said cause and after due deliberation had thereon made *ots* decision and rendered a decree dismissing the complainants amended bill of complaint upon the merits, and that from this decree and dis-

101 missal complainant appealed to the Supreme Court of the Territory, which court last mentioned in all things affirmed the decree of the District Court, and that from the decree of the Supreme Court of the Territory the plaintiff appealed to the Supreme Court of the United States, and that the court last named reversed the decree of the Supreme Court of the Territory, and remanded said cause with instructions to the Supreme Court of the Territory to enter a decree reversing the District Court and remanding the cause to that court with instructions "to order an inquiry into the question whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability, and if so to enter a decree restraining those acts to the extent that they will so diminish."

Twenty-seventh. That the Supreme Court of the Territory of New Mexico remanded said cause with the instructions aforesaid to the Third District Court.

Defendants further allege that thereupon the District Court proceeded to take proofs in accordance with said mandate and instructions and after deliberation made findings of fact and conclusions of law and dismissed said cause upon the merits, and from this decree of dismissal the co*m*plainant again appealed to the Supreme Court of the Territory and which court affirmed the decree of dismissal in all things and that thereafter the complainant appealed from the second decree of affirmance by the Supreme Court of the Territory to the Supreme Court of the United States, and that the decree of the Supreme Court of the Territory was again reversed and said cause was again remanded to the Supreme Court of the Territory with instructions to enter a decree of reversal, and to remand the cause to the District Court with directions to grant leave to both sides to adduce further evidence, upon the sole question as to whether or no the impounding of the waters at the point aforesaid in New Mexico would substantially diminish the navigability of the Rio Grande within the present limits of navigability and if so to enter a decree restraining those acts to the extent that they would so diminish.

102 Twenty-eighth. Defendants further answering said supplemental bill and by way of defense thereto allege that since the commencement of said action and since the granting of said injunction and which injunction was duly served upon defendant The Rio Grande Dam and Irrigation Company said defendant has been under the penalty of the said injunction and has been enjoined and restrained by the same, from prosecuting its said work and in consequence of said action of complainant and of said injunction said

defendants suspended said work and were prevented and hindered from continuing the same; that had said injunction been refused and not granted and had said action not been instituted by the complainant and all of which said proceedings having for their object the annihilation and destruction of the defendant's enterprise the said defendant would have had completed the said irrigation works and would have had the same in successful operation to the great benefit and advantage of a large district of country in New Mexico and all of which without any detriment or disadvantage to the rights of the complainant or of any persons, properties or entities, either above or below the point designated for said works.

Twenty-ninth. Defendants further answering said supplemental bill and by way of defense thereto allege, that the complainants ought not to have to maintain said supplemental bill in this that said supplemental bill alleges and sets forth a cause of action inconsistent and irreconcilable with the cause of action set forth by complainant in the original and amended bill of complaint and that the cause of action alleged and set forth in said supplemental bill is inconsistent and irreconcilable with said original and amended bill, and with the allegations thereof, and with the relief demanded in the same.

That said cause of action alleged in said supplemental bill is not a part of nor incident to the cause of action alleged and set forth in said original and amended bill of complaint.

Thirtieth. Defendants further answering said supplemental bill and by way of defense thereto allege that after the filing of said supplemental bill by the complainants no subpœna or process of
103 any kind was served upon said defendants and because of the failure of complainants to serve said subpœna and process upon the defendants this court was without jurisdiction to grant the relief demanded in said supplemental bill and to enter the decrees thereafter filed and entered thereon.

Thirty-first. Defendants further answering said supplemental bill by way of defence thereto allege, that the cause of action set forth in said supplemental bill accrued since the cause of action set forth in the original and the amended bill, and that said causes of action alleged in said original and amended bill and in said supplemental bill are inconsistent.

Thirty-second. Defendants further answering said supplemental bill, and by way of defence thereto allege that the cause of action set forth in said supplemental bill did not exist at the time of the cause of action set forth in said plaintiff's original and amended bill and defendants refer to said original and amended bill and said supplemental bill and make the said original and amended bill a part hereof, the same being on file in this action in the office of the Clerk of the District Court.

Thirty-third. Defendants further answering said supplemental bill by way of defence thereto allege that the cause of action alleged in the said supplemental bill arose during the pendency of this action and after the same had been twice tried and appealed, as appears by said original and amended bill and said supplemental bill.

Thirty-fourth. Defendants further answering said supplemental

bill by way of defense thereto allege that the court had no power whatever to permit the service and filing of said supplemental bill, as said supplemental bill states a cause of action which did not exist at the time of the commencement of the action herein, which fact appears from said original and amended bill and from said supplemental bill.

Wherefore, the defendants demand that the plaintiff's supplemental bill be dismissed, and that said perpetual injunction granted in the decree entered thereon be dissolved, with costs to these defendants.

(Signed) RIO GRANDE DAM & IRRIGATION COMPANY.
RIO GRANDE IRRIGATION AND LAND COMPANY, LD.

104 KLOCK & OWEN,
Attorneys for Defendants, Albuquerque, New Mexico.

TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

Nathan E. Boyd, being duly sworn, deposes and says: That he is a citizen of the United States and ever has been; that deponent is a director of the Rio Grande Dam and Irrigation Company one of the defendants, and is the duly appointed Receiver of the holders of the debentures of the Rio Grande Irrigation and Land Company, Limited, also one of the defendants; that deponent has had charge of the above entitled cause since its inception and is duly authorized by said defendants to interpose this answer and to verify the same, and to institute and take all proceedings in connection with said action and in connection with the motion based hereon; that deponent has read the original and the amended bill of complaint herein and also the supplemental bill and the answer and plea to said original and amended bill, and the records in said case which accrued prior to the filing of said supplemental bill, except the motion and order for the filing of said supplemental bill; that deponent has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief; and as to those matters he believes it to be true; That the reason why deponent makes this affidavit is that the President and the Secretary Company of the Rio Grande Dam and Irrigation Company are not accessible and are not now in the County of Bernalillo and do not reside in said county; deponent further says that he is the director general of said defendant the Rio Grande Dam and Irrigation Company; that the Rio Grande Irrigation and Land Company, Limited, one of the defendants herein was a foreign corporation under the laws of Great Britain and Ireland and that deponent is the duly appointed Receiver of the holders of the debentures of the Rio Grande Irrigation and Land Company, Limited; that as director general of said Rio Grande Dam and Irrigation Company deponent is the agent

of said defendant and is familiar with all the facts and proceedings alleged and set forth herein.

(Signed) NATHAN BOYD.

Subscribed and sworn to before the undersigned, on this the 28th day of October, 1903.

[SEAL.] (Signed) HARRY P. OWEN,
Notary Public.

Which said Motion above set forth is endorsed in words and figures as follows, to-wit:

105 No. 1243. In the District Court, Third Judicial District, Territory of New Mexico. United States of America *vs.* Rio Grande Dam and Irrigation Company *et al.* Motion and affidavits in support thereof to open default upon motion for leave to file supplemental bill to vacate order granting leave to file same and to open defendants' default in failing to answer said supplemental bill and to vacate decrees entered in this cause upon said default. Filed in my office Oct. 31, 1903. James P. Mitchell, Clerk, By ——— ———, Deputy. Klock & Owen, Attorneys &c., Albuquerque, N. M.

And thereafter, on the 29th day of January, A. D. 1904, there was filed and entered of record in the office of the Clerk of this Court the order allowing supplemental complaint, which is in words and figures as follows, to-wit:

In the District Court, Third Judicial District, Territory of New Mexico.

No. 1243.

UNITED STATES OF AMERICA, Plaintiff,
vs.
RIO GRANDE DAM & IRRIGATION COMPANY ET AL., Defendants.

Order.

This cause coming on to be heard upon the motion of the defendants, the Rio Grande Dam and Irrigation Company and the Rio Grande Land and Irrigation Company, Limited, to vacate and set aside the order entered in this cause on the 7th day of April, A. D. 1903, at Las Cruces, Dona Ana County New Mexico granting to the plaintiff herein the privilege and right to file a supplemental bill of complaint in this cause, and praying leave of the Court to oppose said motion for leave to file said supplemental bill of complaint and

106 permit the defendants to have a hearing thereon, and that the order granting to the plaintiff herein the privilege and right to file said supplemental bill of complaint be vacated and set aside upon the ground that the Court had no power to permit the plaintiff to file said supplemental bill of complaint and praying that the decree entered in this cause upon the default of the

defendant in answering the said supplemental bill of complaint be vacated and set aside and declared to be of no effect and that the amended decree in this cause filed in this Court on the 5th day of October, 1903, upon said plaintiff's application be vacated and set aside and held of no effect said decree having been granted upon defendants default to answer said supplemental bill of complaint and that the defendants herein should this court determine not to relieve said defendants from that default upon said motion of plaintiff to file said supplemental bill of complaint be permitted to come in and answer said bill of complaint and present their issues on the merits of said supplemental bill of complaints and to relieve the defendants from their default therein and that the defendants have such other and further relief as to this Court may seem just and equitable.

And the Court having counsel for the plaintiff and defendants and being fully advised in the premises doth find that the motion for leave to file said supplemental bill of complaint was served upon the attorneys of record of the said defendants and that there was no irregularity in the filing of said supplemental bill of complaint, and that it has no power to set aside the decree entered upon said bill at this time upon said application, doth overrule said motion.

(Signed) FRANK W. PARKER, *Judge*.

Dated Santa Fe, New Mexico, January 29th, 1904.

Which said Order is endorsed in words and figures following, to-wit:

No. 1243. Order allowing Supplemental Complaint. Filed in my office Jan. 29, 1904. James P. Mitchell, Clerk.
Recorded.
Charged.

107 And thereafter on the 8th day of March, A. D. 1904, a Motion for Appeal and Order allowing same was filed and entered of record in the office of the Clerk of this Court, which said Motion and Order are in words and figures as follows, to-wit:

In the District Court, Third Judicial District, Territory of New Mexico.

UNITED STATES OF AMERICA
vs.
RIO GRANDE DAM AND IRRIGATION COMPANY ET AL., Defendants.

Motion for Appeal.

Come now the defendants, The Rio Grande Dam and Irrigation Company, and the Rio Grande Irrigation and Land Company, Limited, in above entitled cause, and move and pray the Court to be

permitted to appeal to the Supreme Court of the Territory of New Mexico from the final decision and decree entered herein.

(Signed) KLOCK & OWEN,
Attorneys for Defendants.

In the District Court, Third Judicial District, Territory of New Mexico.

No. 1243.

UNITED STATES OF AMERICA, Plaintiff,
vs.
RIO GRANDE DAM AND IRRIGATION COMPANY ET AL., Defendants.

Order.

This cause coming on to be heard upon the application of the defendants for an appeal from the judgment and decree of this court to the Supreme Court of the Territory of New Mexico;

It is ordered by the court the said motion may be and the same is hereby granted, and that defendants be and they hereby are allowed an appeal from the judgment and decree of this court to the Supreme Court of the Territory of New Mexico.

Done at Santa Fe, New Mexico, Feb. 25, 1904.

(Signed) FRANK W. PARKER, *Judge.*

108 Which said Motion and Order is endorsed in words and figures following, to-wit:

No. 1243. Territory of New Mexico. In the District Court, Third Judicial District. The United States of America *vs.* Rio Grande Dam & Irrigation Company, *et al.* Motion for Appeal to Supreme Court and Order allowing same. Recorded. Charged. Filed in my office Mar. 8, 1904. James P. Mitchell, Clerk, by N. C. Flint, Dep. Klock & Owen, Attorneys for Def'ts and Appellants.

And thereafter, on the 5th day of April, A. D. 1904, there was filed and entered of record in the office of the Clerk of this Court the citation, which is in words and figures following, to-wit:

In the District Court, Third Judicial District, Territory of New Mexico.

UNITED STATES OF AMERICA
vs.
RIO GRANDE DAM AND IRRIGATION COMPANY ET AL.

To the complainant above named and to William B. Childers, United States Attorney for the District of the Territory of New Mexico and attorney for complainant, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the Territory of New Mexico, to be holden at Santa Fe, the seat of Government of said Territory, on the first

Wednesday after the first Monday in January 1905, to-wit, the 4th day of January, 1905, pursuant to an appeal in the above entitled cause filed in the office of the Clerk of the Third Judicial District Court of the Territory of New Mexico, wherein the Rio Grande Dam and Irrigation Company and the Rio Grande Irrigation and Land Company, Limited, are defendants and appellants and the United States of America is appellee and complainant, to show cause,
109 if any there be why judgment rendered against the said defendants and appellants as in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in their behalf.

Witness the Honorable Frank W. Parker, Associate Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Third Judicial Court thereof, and the seal of the said district court this 28th day of March, 1904.

[SEAL.] (Signed) JAMES P. MITCHELL, *Clerk.*

Due and personal service of the foregoing citation admitted this 30th day of March, 1904, at Albuquerque, N. M.

(Signed) WM. B. CHILDERS,
United States Attorney and Attorney for Plaintiff.

Which said Citation is endorsed in words and figures following, to-wit:

No. 1243. Territory of New Mexico. In the District Court, Third Judicial District. United States *vs.* Rio Grande Dam & Irrigation Company *et al.* Citation (Original). Filed in my office Apr. 5, 1904. James P. Mitchell, Clerk. Klock & Owen, attorneys for defendants and appellant, Albuquerque, New Mexico. Charged.

And thereafter, on the 8th day of March, A. D. 1904, there was filed and entered of record in the office of the Clerk of this Court the Defendants' Exceptions which are in words and figures following, to-wit:

In the District Court, Third Judicial District, Territory of New Mexico.

1243.

UNITED STATES OF AMERICA, Plaintiff,
vs.
RIO GRANDE DAM AND IRRIGATION COMPANY ET ALS., Defendants.

The defendants hereby except to the order and ruling of this court overruling said motion made herein and mentioned in said
110 order signed by Frank W. Parker, Judge, and dated Santa Fe, New Mexico, January 29th, 1904, and entered in the office of the Clerk of this Court at Las Cruces, Dona Ana County, New Mexico, and defendants except to each and every part of said order; the defendants further except to the ruling of this court overruling their said motion made herein to set aside the decrees origi-

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nally made by this court herein on the 21st day of May, 1903, and the amended decree therein, made by this court on the 5th day of October, 1903, said original and amended decrees being entered in the office of the Clerk of this Court at Las Cruces, as aforesaid, and the defendants further except to the ruling of this court overruling said defendants' motion made herein to relieve defendants from their said default as to the order made by this court on the 7th day of April, 1903, at Las Cruces, aforesaid, granting to the plaintiff herein the privilege and right to file a supplemental bill of complaint, in this cause, and defendants further except to the ruling of this court overruling their motion made herein that said court permit said defendants to oppose the granting by it of said order of said court made on said 7th day of April, 1903, and also further except to the ruling of said court in overruling defendants' motion to relieve said defendants from their said default in the premises, and further except to said court's ruling overruling defendants' motion upon the want of power in said court to grant and allow said defendants' motion, and also further except to said court's ruling overruling defendants' motion for leave to file their answer to said complainant's supplemental bill and to restore the said cause upon the docket of said Court upon the issues made by said supplemental bill and the defendants' proposed answer thereto; and defendants further except to each and every order, ruling and decree of the court in the premises and still except to the same.

(Signed) KLOCK & OWEN,
Att'ys for Def's.

Which said Bill of Exceptions is endorsed in words and figures following, to-wit:

No. 1243. In the District Court, Third Judicial District,
111 Territory of New Mexico. United States of America *vs.* Rio Grande Dam & Irrigation Company *et al.* Exceptions. Filed in my office Mar. 8, 1904. James P. Mitchell, Clerk, by N. C. Flint, Dep.

112 UNITED STATES OF AMERICA,
Third Judicial District Court, Territory of New Mexico:

I, the undersigned Clerk of the Third Judicial District Court of the Territory of New Mexico, do hereby certify that the above and foregoing 108 pages contain a full, true and correct copy of all record entries and filings found in the office of my Clerk, as per præcipe of proceedings required in said transcript, in case No. 1243, wherein the United States of America is plaintiff and The Rio Grande Dam and Irrigation Company, *et al.*, are defendants, as the same appear on file and of record in my office.

In witness whereof, I hereunto set my hand and affix the seal of the Third Judicial District Court at my office in Las Cruces, New Mexico, this 9th day of December, A. D. 1904.

[SEAL.] (Signed) WILLIAM E. MARTIN, *Clerk,*
By JOHN LEMON, *Deputy.*

(Here follows facsimile of prospectus, marked pp. 113-117.)

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118 And afterwards, on to wit: *on* the 20th day of December, A. D., 1904, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico an additional record and precipe for additional record, which said precipe for amended and additional record was and is in words and figures following to wit:

TERRITORY OF NEW MEXICO:

In the District Court, Third Judicial District.

No. 1243.

UNITED STATES OF AMERICA, Plaintiff,
vs.
RIO GRANDE DAM & IRRIGATION COMPANY ET AL., Defendants.

TERRITORY OF NEW MEXICO, *ss:*

To James P. Mitchell, Clerk of the Third Judicial District Court, Territory of New Mexico:

You are hereby required to prepare copies of the records in your office in the above-entitled action of the following papers to-wit:

Original Bill of Complaint.
The Amended Bill of Complaint.
Injunction.
The Affidavits upon which said injunction was issued.
The proof of service of injunction on defendants.
The defendants' plea to said original and amended bill.
The defendants' answer to said bill of complaint.
The complainant's reply.
The findings and decision of the court dismissing the complainant's bill.
Appeal to the Territorial Supreme Court from the judgment of dismissal.
The judgment of affirmance by the Territorial Supreme Court.
Appeal to the United States Supreme Court from the judgment of affirmance by the Territorial Supreme Court.

119 Mandate of reversal of judgment by Supreme Court of the United States.

Mandate of Territorial Supreme Court to Third Judicial District Court.
Findings of Third Judicial District Court upon second trial and decision and judgment of dismissal.
Appeal to the Territorial Supreme Court from decision of District Court.
Judgment of affirmance of Territorial Supreme Court.
Appeal from Territorial Supreme Court to United States Supreme Court.
Judgment of reversal of the United States Supreme Court and mandate of said court to the Territorial Supreme Court.

Mandate of Territorial Supreme Court to Third Judicial District Court.

Petition of intervention by the Territory of New Mexico.

Decision of District Court and order thereon upon petition of intervention.

Order permitting filing of supplemental complaint.

Supplemental complaint.

Decree made thereon; Motion to amend decree.

Amended decree.

Affidavits and motion to set aside and vacate decree.

Order denying motion.

Prayer for appeal and order allowing same.

Citation.

Exceptions to order of court overruling motion to open default.

All of which papers with this præcipe are to be the record in this case to be certified by you.

(Signed) KLOCK & OWEN,
Attorney- for Defendants.

TERRITORY OF NEW MEXICO:

In the District Court, Third Judicial District.

No. 1243.

UNITED STATES OF AMERICA, Plaintiff,
vs.
RIO GRANDE DAM & IRRIGATION COMPANY ET AL., Defendants.

Amended Præcipe.

120 TERRITORY OF NEW MEXICO, *ss:*

To W. E. Martin, Clerk of Third Judicial District Court:

The defendants herein desire to incorporate within and amend the præcipe in the above entitled cause filed herein in the office of the clerk on the 27th day of September, 1904; and to state therein by this amendment to point or points the defendants desire to review in the Territorial Supreme Court upon their appeal from the decision of the trial court, and further what action of the trial court said defendants desire to review in the said Territorial Supreme Court, to wit:

1. Said defendants desire to review the order of the District Court, Frank W. Parker, Judge, Preciding, entered in the office of the clerk of the Third Judicial District on the 29th day of January, 1904.

2nd. Said defendants desire to review in the Territorial Supreme Court the action of the third Judicial District Court in denying defendants' motion to set aside the decree originally made by the said district court on the 21st day of May, 1903, and the amended decree made by said court on the 5th day of October, 1903, and

the order made by said district court on the 7th day of April, 1903, at Las Cruces, aforesaid, granting to the plaintiff herein the privilege and right to file a supplemental bill of complaint in this cause, upon the question of the want of power expressed in said order by said court to grant said relief, and the provisions of said order by said court denying its want of power to grant said relief, and also the refusal of that exercise of discretion on the part of said court to grant said relief prayed for by the defendants in their motion herein.

3rd. Said defendants desire to review in the Territorial Supreme Court the action of the third Judicial District Court in denying defendants' motion to set aside the decree, both original and amended, and to relieve defendants from their default in answering the said supplemental bill of complaint and permit the said defendants
121 to serve their said answer to said supplemental bill and to raise an issue upon the merits of said supplemental bill by their said answer and which said proposed answer was a part of the motion papers herein and is contained in this record.

4th. Said defendants desire to review in the Territorial Supreme Court the action of the third judicial District Court in denying their motion upon all the grounds stated in said defendants' motion for relief and which are contained in the motion papers as a part of the transcript herein.

5th. Said defendants desire to review in the Territorial Supreme Court the action of the Third Judicial District Court in permitting by its order the complainant herein to file in this action a supplemental complaint, and also the power of said court in the condition of said action and its record history to file a supplemental complaint of the kind and character embodied in the record herein and setting forth the cause of action as therein stated and which did not exist at the time of filing the original complaint herein, and defendants desire to review the action of said Third Judicial District Court upon each and every one the questions set forth in this subdivision.

6th. Said defendants desire to review in the Territorial Supreme Court the action of the third judicial District Court in exercising its discretion permitting the complain-t to file a supplemental bill of complaint in this action and the entry of a decree thereon by defen*edna*-t's alleged default and refusal by said court to vacate said original and said amended decree and the further refusal by said court to relieve defendants default in failing to answer said supplemental bill and to permit said defendants to serve an answer to said supplemental bill said defendants' contending that there was an abuse of the exercise of discretion by said court in the premises.

7th. Said defendants desire to review in the Territorial Supreme Court, the action of the Third Judicial District Court in denying their motion to strike from the files the said plaintiffs' supple-
122 mental complaint and to vacate said original and amended decree and to restore said cause to the docket upon the issue as framed by the pleadings herein and as said issues stood upon the record on the said 7th day of April, 1904, the date of said court's order, permitting the filing of said supplemental complaint.

(Signed) KLOCK & OWEN,
Attorneys for Defendants.

UNITED STATES OF AMERICA,
Third Judicial District, Territory of New Mexico, ss:

I, the undersigned Clerk of the Third Judicial District of the Territory of New Mexico, do hereby certify that the above and foregoing three and a half typewritten pages contain a full, true and correct copy of the precipe and amended Precipe filed in the office of the Clerk of the said Court on September 27th, and December 19th, 1904, as the same appear on file in my office.

In Witness Whereof, I hereunto set my hand and affix the seal of the said District Court at my office in Las Cruces, New Mexico, this the 19th Day of December, A. D., 1904.

[SEAL.]

(Signed) WILLIAM E. MARTIN, *Clerk*,
By JOHN LEMON, *Deputy*.

And heretofore, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe the seat of Government on the last Monday in July, 1897, the same being the 26th day of July, A. D., 1897, on the twenty-seventh day of the said regular term, the same being the twenty-fifth day of August A. D., *1906*, the following among other proceedings were had and entered of record, following to wit:

123 No. 753.

UNITED STATES OF AMERICA, Appellant,
vs.
THE RIO GRANDE DAM & IRRIGATION CO. ET AL., Appellees.

Appeal from the Third Judicial District Court.

This cause having been argued and submitted to and taken under advisement by the court at a former day of the present term and the court being now sufficiently advised in the premises, announces its decision by Chief Justice Smith, Associate Justices Collier, Hamilton and Laughlin concurring, Associate Justice Bants not sitting, affirming the judgment of the court below, for reasons stated in open Court, and that will appear more fully in the opinion of the court to be filed herein It is therefore ordered adjudged and decreed by this court that the Judgment of the district court of the Third Judicial District in the Territory of New Mexico whence this cause came into this court, be and the same hereby is affirmed, and in accordance therewith said Judgment of said District Court that said injunction heretofore issued herein be dissolved and that said cause be, and the same hereby is dismissed and that the defendants do have and recover their reasonable costs herein, as well in the court below as in this Court to be taxed for which let execution issue, and thereupon appellant herein by her Attorney William B. Childers, Esq., prays an appeal to the Supreme Court of the United States from the Judgment and decree of this Court, It is therefore ordered

that the appellant herein be and hereby is allowed an appeal to the Supreme Court of the United States from this Judgment and decision.

And afterwards, on to wit, *on* the 5th day of July, A. D., 1899, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexic*o*, a mandate from the Supreme Court of the United States to the Territorial Supreme Court which said mandate was and is in words and figures following, to-wit:

124 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the Territory of New Mexico, Greeting:

[SEAL.]

Whereas, lately in the Supreme Court of the Territory of New Mexico, before you or some of you in a cause between The United States, appellant, and the Rio Grande Dam & Irrigation Company and The Rio Grande Irrigation and Land Company, appellees wherein the decree of said Supreme Court, entered in said cause on the 25th day of August, A. D., 1897, is in the following words, viz:

"This cause having been argued and submitted to and taken under advisement by the court at a former day of the present term, *and* the court, being now sufficiently advised in the premises, announces its decision by Chief Justice Smith, Associate Justices Collier, Hamilton and Laughlin concurring, Associate Justice Bantz not sitting, affirming the judgment of the court below, for reasons stated in open court and that will appear more fully in the opinion to be filed herein. It is therefore ordered, adjudged, and decreed by the court that the judgment of the district court of the Third Judicial District in the Territory of New Mexico, whence this cause came into this court, be, and the same hereby is, affirmed, and in accordance with said judgment of said district court it is ordered, adjudged and decreed that said injunction, heretofore issued herein, be dissolved and that said cause be, and the same hereby is, dismissed and that said defendants do have and recover their reasonable costs herein, as well in the court below as in this court, to be taxed, for which let execution issue; and thereupon the appellant herein, by her Attorney William B. Childers, Esq. prays an appeal to the Supreme Court of the United States from the judgment and decision of this court. It is therefore ordered that appellant herein be, and hereby is allowed an appeal to the Supreme Court of the United States from this judgment and decision."

125 as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And Whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety eight, the said cause

came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, reversed.

And it is further ordered, that this cause be, and the same is hereby, remanded to the said Supreme Court with directions to set aside the decree of dismissal, and to order an inquiry into the question whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability, and if so, to enter a decree restraining those acts to the extent that they will so diminish. May 22, 1899.

You, therefore, are hereby commanded that such further proceedings, be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of June, in the year of our Lord, one thousand eight hundred and ninety nine.

(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

126 Which said mandate was and is endorsed, as follows to wit:

"Supreme Court of the United States. No. 215, October Term, 1898. The United States *vs.* The Rio Grande Dam & Irrigation Co. *et al.* Mandate. Filed in my office this July 5th, 1899. Jose D. Sena, Clerk."

And afterwards, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of Government, on the first Wednesday after the first Monday in January 1900, the same being the 3rd day of January, A. D., 1900 on the thirty-ninth day of the said regular term, the same being Friday, the 24th day of August, the following among other proceedings were had and entered of record, following to wit:

No. 879.

UNITED STATES OF AMERICA, Appellant,
vs.
THE RIO GRANDE DAM & IRRIGATION CO. ET AL., Appellees.

Appeal from Third Judicial District Court.

This cause having been argued by counsel, and submitted to and taken under advisement by the court upon a former day of the present term, *and* the court being now sufficiently advised in the premises, announces its decision by Chief Justice Mills, Associate Justices

McFie, and Crumpacker concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file; It is therefore considered and adjudged by the court that the judgment of the District Court in and for the Third Judicial District be, and the same, hereby is affirmed, and that in accordance therewith, It is considered adjudged and decreed by the court, that the bill of complaint of the appellants herein be and the same hereby is dismissed. It is further ordered, adjudged and decreed by the court that the appellees do have and recover of and from the appellants their costs in this behalf expended, in this court as well as in the court
127 below to be taxed, and it is so ordered.

And afterwards, in vacation, on to wit, *on* the 14th day of November, A. D., 1900, there was entered of record the following order in the above entitled cause, as follows to wit:

No. 879.

UNITED STATES OF AMERICA, Plaintiff & Appellant,
vs.
RIO GRANDE DAM & IRRIGATION CO. ET AL., Defendants and Appellees.

Appeal from District Court, Third Judicial District.

Order Allowing Appeal.

Now, on to wit, the 13th day of November, A. D., 1900, It is ordered that the appeal prayed for be allowed, from the said decree and judgment of the court entered in said above entitled cause, on the 24th day of August A. D., 1900.

And it is further ordered that the said appellant, have leave to file assignment of error and make the same a part of the record in said cause by the clerk, or at any time after the said cause may be docketed in the Supreme Court of the United States.

And it is further ordered, that citation issue in said cause to be served upon the Counsel for the said appellees, as required by the statutes and rules of the Court.

(Signed) WILLIAM J. MILLS,
Chief Justice of the Supreme Court of the Territory of New Mexico.

And afterwards, on to wit, *on* the twenty-fourth day of April, A. D. 1902, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a mandate from the Supreme Court of the United States to the Territorial Supreme Court which said mandate was and is in words and figures following to wit:

128 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the Territory of New
[SEAL.] Mexico, Greeting:

Whereas, lately in the Supreme Court of the Territory of New Mexico, before you or some of you, in a cause between The United States of America, appellant, and the Rio Grande Dam & Irrigation Company, *et al.* appellees, No. 879, wherein the decree of the said Supreme Court entered in said cause on the 24th day of August, A. D. 1906, in the following words viz:

"This cause having been argued by counsel and submitted to and taken under advisement by the court upon a former day of the present term, *and* the court being now sufficiently advised in the premises, announces its decision by Chief Justice Mills, Associate Justice McFie and Crumpacker concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file. It is therefore considered and adjudged by the court that the judgment of the District Court in and for the third judicial District, whence this cause came into this court, be, and the same hereby is affirmed, and that, in accordance therewith, it is considered, adjudged, and decreed by the court that the bill of complaint of the appellants herein, be, and the same hereby is, dismissed. It is further ordered, adjudged and decreed by the court that the appellees do have and recover of and from the appellant their costs in this behalf expended, in this court as well as in the court below to be taxed, and it is so ordered."

as by the inspection of the transcript of record of the said Supreme Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress in said case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of Our Lord one thousand nine hundred and one, the said cause came
129 on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered, adjudged, and decreed by this court that the decree of the said Supreme Court in this cause be, and the same is hereby reversed.

And it is further ordered that this cause be, and the same hereby is remanded to the said Supreme Court with directions to reverse the decree of the District Court and to remand the cause to that court with directions to grant leave to both sides to adduce further evidence. March 3, 1902.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the third day of April, in the year of our Lord one thousand nine hundred and two.

(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Which said mandate was and is endorsed as follows viz:
"No. 879. Supreme Court of the United States, No. 239, October Term, 1901. The United States *vs.* The Rio Grande Dam & Irrigation Co. *et al.* Mandate. Filed in my office this April 24, 1902. Jose D. Sena, Clerk."

And afterwards, on to wit, *on* the 4th day of January, A. D., 1905, there was filed in the office of the Supreme Court of the Territory of New Mexico, in the above entitled cause as Numbered 1075, a motion and stipulation, which said motion and stipulation was and is in words and figures following to wit:

130 In the Supreme Court of the Territory of New Mexico.

UNITED STATES OF AMERICA, Appellee,
vs.
RIO GRANDE DAM AND IRRIGATION COMPANY ET AL., Appellants

Come now the defendants and move the court to allow the appeal herein to be heard, argued and determined upon a typewritten copy of the record herein, the said record having heretofore been filed with the clerk of this court, and the attorney for the appellee Hon. W. B. Childers, U. S. Attorney, having consented by stipulation to have the said appeal heard argued and determined upon said typewritten copy of the record herein.

(Signed) KLOCK & OWEN,
Attorney- for Defendants.

In the Supreme Court of the Territory of New Mexico.

UNITED STATES, Appellee,
vs.
RIO GRANDE DAM & IRRIGATION CO. ET AL., Appellants.

Stipulation.

It is hereby stipulated and agreed by and between the counsel for the respective parties herein that the appeal herein may be heard argued and determined upon the typewritten transcript now on file in this court and constituting the record on said appeal.

WILLIAM B. CHILDERS,
Attorney for Appellee.
KLOCK & OWEN,
Attorney- for Appellant-.

Which said motion and stipulation was endorsed as follow*ing*, viz:
"No. 1075. In the Supreme Court of the Territory of New Mexico. United States, appellee, *vs.* Rio Grande Dam & Irrigation Co. *et al.*, appellants. Motion and Stipulation. Filed in my office this Jan. 4, 1905. Jose D. Sena, Clerk."

131 And afterwards, on to wit: *on* the 16th day of Jan. A. D. 1905, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors in the above entitled cause, which said assignment of errors was and is in words and figures, following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1075.

UNITED STATES OF AMERICA, Appellee,
vs.
RIO GRANDE DAM & IRRIGATION CO. ET AL., Appellants.

Appeal from District Court, Third Judicial District.

Assignment of Errors.

Now come the above appellants and make the following assignments of error in the trial and proceedings of the court below:

1. The Court erred in granting the order made on the 7th day of April, 1903, allowing the plaintiff to file its supplemental bill of complaint in this cause:

2. The Court erred in granting the order of April 7th, 1903, allowing the plaintiff to file its supplemental bill of complaint without notice to the defendants:

3. The court below er*r*ed in allowing the plaintiff to file its supplemental bill in this cause in this to wit, the said supplemental bill of complaint was illegal and unauthorized upon the ground that the said supplemental bill alleges and sets forth a cause of action irreconcilable and inconsi*d*tent with the cause of action alleged and set forth in the original and amended bills of complaint in this cause, and the said cause of action alleged and set forth in said supplemental bill was not in existence at the time of the filling of
132 the original and amended bills of complaint.

4. The court below erred in allowing the plaintiff to file its supplem*a*ntal bill and in permitting *y*he subsequent proceedings thereon to the decrees without the service or process of summons upon the defendants, the said supplemental bill alleging a new and independent cause of action, and a cause of action inconsistent with the cause of action alleged and set forth in the original and amended bills, and the cause of action in said supplemental bill not being in existence at the time of filing said original and amended bill- and having no relation to or connection with the cause of action alleged and set forth in said original and amended bill-.

5. The court below erred in allowing the plaintiff to file its supplemental bill of complaint setting forth a new and independent cause of action not in existence at the time of the commencement of the original action, which said action of the court was unauthosi*z*ed and not within the power of the court.

6. The court below erred in granting the decree entered in this cause upon the said supplemental bill on the 21st day of May, 1903, said decree being illegal and unauthorized upon the ground that the court had no power to grant the same and that the said court had not acquired jurisdiction of the parties and had not jurisdiction of the subject matter of the action.

7. The court below erred in granting the amended decree entered in this cause upon the said supplemental bill on the 5th day of October, 1903, said amended decree being illegal and unauthorized upon the ground that the court had no power to grant the same and that the said court had not acquired jurisdiction of the parties and had not jurisdiction of the subject matter of the action.

8. The court below erred in its refusal to relieve the defendants from their default in not appearing to oppose the motion of April 7th 1903, granting to the plaintiff the right to file its supplemental bill of complaint.

133 9. The court erred in holding that it had not the power to relieve the defendants from their default in not appearing to oppose the motion of April 7th, 1903, allowing to the plaintiff the right to file its supplemental bill.

10. The court erred in denying the motion of defendants to vacate and set aside the order of April 7, 1903, which allowed the plaintiff to file its supplemental bill.

11. The court below erred in that it had not the power to set aside the order of April 7, 1903, allowing the plaintiff to file its supplemental bill.

12. The court below erred in denying the motion of the defendants to vacate and set aside the decree entered in this cause on the 21st day of May, 1903, and the amended decree dated October 5, 1903.

13. The court erred in denying the motion of defendants to vacate and set aside the decree of May 21st, 1903, and the amended decree of October 5th, 1903, upon the ground of want of power in the court to grant the said motion.

14. The court below erred in denying the motion of the defendants to relieve them from their default in failing to appear and answer the proposed supplemental bill.

15. The court below erred in denying upon the ground of a want of power in said court to grant the motion of the defendants to relieve them from their default in not appearing to answer, plead or demur to said supplemental bill.

134 16. The court erred in refusing to consider the motion of the defendants to relieve them from their default in this action and the said court further erred in refusing to exercise its discretion and consider the application of said defendants to relieve them from their default upon the merits.

(Signed) KLOCK & OWEN,
Attorneys for Appellants, Albuquerque, N. M.

Which said assignment of errors was and is endorsed as follows, viz:
"No. 1075. In the Supreme Court of the Territory of New Mexico. United States of America, appellee, *vs.* Rio Grande Dam & Irrigation

Company *et al.*, appellants. Assignment of errors. Filed in my office this Jan. 16, 1905. Jose D. Senal, Clerk. Klock & Owen, attorneys for appellants, Albuquerque, N. M."

And afterwards *on* to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government, on the first Wednesday after the first Monday in January, the same being the 4th day of January A. D. 1905, on the tenth day thereof, the same being Tuesday January 17th, 1905, the following among other proceedings were had and entered of record, following to wit:

No. 1075.

THE UNITED STATES OF AMERICA, Appellee,
vs.
THE RIO GRANDE DAM & IRRIGATION CO. ET AL., Appellants.

Appeal from District Court, Third Judicial District.

This cause coming on to be heard upon the transcript of record assignment of errors and Briefs of Counsel, was argued by H. P. Owen for appellants and W. B. Childers, Esq., for appellee and submitted to the court and the court not being sufficiently advised
135 in the premises, takes the same under advisement. It is further ordered by the court that the parties herein do have ten days within which to file their briefs herein.

And heretofore, *on* to wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government on the first Wednesday after the first Monday in January, 1906, the same being the 3rd day of January, on the twenty-sixth day thereof, the same being the 2nd day of March, A. D., 1906, the following among other proceedings were had and entered of record following to wit:

No. 1075.

THE UNITED STATES OF AMERICA, Appellee,
vs.
THE RIO GRANDE DAM AND IRRIGATION CO. ET AL., Appellants.

Appeal from District Court, Third Judicial District.

This cause having been argued by counsel, and submitted to and taken under advisement by the court, upon a previous day of the present term, and the court being now sufficiently advised in the premises, announces its decision by Associate Justice McFie, Chief Justice Mills and Associate Justices Pope, Mann, and Abbott, concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file. It is therefore, considered and adjudged by the court that the judgment of the district court in

and for the Third Judicial District *Court,* whence this cause came into this court, be and the same hereby is affirmed, and that in accordance therewith, it if therefore considered, ordered and adjudged by the court that the rights of the said defendants, or either of them to construct and complete the said reservoir and said ditch, or any part thereof, under and by virtue of said Act of Congress of March 3, 1901, be and the same are hereby declared forfeited.
136 It is further ordered, adjudged and decreed by the court by reason of the premises that an injunction be, and the same is hereby granted against the said defendants, enjoining them from constructing or attempting to construct the said reservoir or any part thereof, and that the same be made perpetual. It is further ordered, adjudged and decreed by the court that the said plaintiff have and recover from the said defendants in error, its costs in this behalf expended, to be taxed for which let execution issue.

And afterwards on to wit, *on* the 27th day of August A. D., 1906, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, a motion for appeal which said motion for appeal was and is in words and figures following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1075.

THE UNITED STATES OF AMERICA, Plaintiff and Appellee,
vs.
THE RIO GRANDE DAM & IRRIGATION CO. and THE RIO GRANDE IRRIGATION AND LAND CO., LIMITED, Defendants and Appellants.

Appeal from District Court, Third Judicial District.

Motion for Appeal.

The Rio Grande Dam & Irrigation Company and the Rio Grande Irrigation and Land Company, Limited, the defendants above named, by their attorneys, Messrs. Klock & Owen, feeling themselves aggrieved by the order and judgment entered on the 2nd day of March, A. D., 1906, in the above entitled cause, do hereby appeal from the said order, judgment and decree of the said Supreme Court of the Territory of New Mexico, to the Supreme Court of the United States, and pray that their appeal may be allowed and
137 that a transcript of record, proceedings and papers therein, duly authenticated, may be sent to the said Supreme Court of the United States.

THE RIO GRANDE DAM & IRRIGATION COMPANY,
THE RIO GRANDE IRRIGATION AND LAND CO., LIMITED,
Defendants and Appellants.
KLOCK & OWEN,
Attorneys for Defendants and Appellants, Albuquerque, N. M.

Which said motion for appeal was and is endorsed following to wit:

"No. 1075. In the Supreme Court of the Territory of New Mexico, January Term, A. D., 1906. The United States of America, plaintiff and appellee, *vs.* The Rio Grande Dam & Irrigation Co. *et al.*, appellants. Motion for appeal. Filed in my office this Aug. 27, 1906. Jose D. Sena, Clerk."

And afterwards, on to wit: *on* the 27th day of August, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico an Affidavit of value in the above entitled cause, which said affidavit of value was and is in words and figures, following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1075.

THE UNITED STATES OF AMERICA, Plaintiff and Appellee,
vs.
THE RIO GRANDE DAM & IRRIGATION CO. and THE RIO GRANDE IRRIGATION & LAND CO., LIMITED, Defendants and Appellants.

Appeal from District Court, Third Judicial District.

UNITED STATES OF AMERICA,
State of Texas, County of El Paso:

E. V. Berrien, being duly sworn says that he is a citizen of the United States and resides at El Paso in the County of El Paso,
138 State of Texas, deponen*d* further says that he is familiar with the litigation and the issues therein between the parties to this action above named, and deponent further says that he has been so familiar with said issues in said action since the commencement of the said action in 1897; deponent further says that there is more than five thousand dollars involved in said controversy and that the defendants' property right and interests in said case as affected by said action, greatly exceed the sum of five thousand dollars; exclusive of costs, deponent further says that he is well acquainted with the work which the said defendants had in process of development at the time said defendants were enjoined by the plaintiff above named and in this action, and that the said outlay at the time aforesaid made by said defendants, was much in excess of five thousand dollars.

(Signed) E. V. BERRIEN.

Subscribed and sworn to before me this 20th day of August 1906.

[SEAL.] (Signed) JOSEPH M. NEALON,
Notary Public.

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1075.

THE UNITED STATES OF AMERICA, Plaintiff and Appellee,
vs.
THE RIO GRANDE DAM & IRRIGATION CO. ET AL., Defendants and Appellants.

Appeal from District Court, Third Judicial District.

UNITED STATES OF AMERICA,
State of Texas, County of El Paso:

Nathan Boyd, being duly sworn, says that he is a citizen of the United States and resides at Las Cruces, in the county of Dona Ana Territory of New Mexico; deponent further says that he is familiar with the litigation and the issues therein between the parties above named in this action, and deponent further says that he has been so familiar with said issues in said action since the commence-
139 ment thereof in 1897; deponent further says that there is more than five thousand dollars involved in said controversy between said parties and that the defendants' property rights and interests in said cause as affected thereby are greatly in excess of the sum of five thousand dollars, exclusive of costs deponent further says that he is well acquainted with the work which the said defendants had in process of development at the time said defendants were enjoined by the plaintiff in this action and that the said outlay and expenditures at the time aforesaid and made by said defendant was much in excess of the sum of five thousand dollars.

(Signed) NATHAN BOYD.

Subscribed and sworn to before me this 20th day of August, 1906.

[SEAL.] (Signed) JOSEPH M. NEALON,
Notary Public.

Which said affidavit of value was and is endorsed as follows, to wit:

"No. 1075. In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906. The United States of America, Plaintiff & Appellee, against The Rio Grande Dam & Irrigation Company *et al.*, Defendants and appellants. Affidavit setting forth value of amount in controversy in suit. Filed in my office this Aug. 27, 1906. Jose D. Sena, Clerk."

And afterwards, on to wit, *on* the 27th day of August, A. D., 1906, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors on appeal to the Supreme Court of the United States, in the above entitled

cause, which said assignment of errors on appeal to the Supreme Court of the United States, was and is in words and figures following to wit:

140 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

THE UNITED STATES OF AMERICA, Plaintiff and Appellee,
vs.
THE RIO GRANDE DAM & IRRIGATION COMPANY and THE RIO GRANDE IRRIGATION & LAND COMPANY, LIMITED, Defendants and Appellants.

Assignment of Errors, to be Returned as a Part of the Record on Appeal to the Supreme Court of the United States.

Now comes the above named appellants and say that there is manifest error in the record, proceedings and decree of the Supreme Court of the Territory of New Mexico, in the above entitled cause in this, to-wit:

1.

The Supreme Court of the Territory erred in not sustaining the first assignment of error and reversing the decree of the District Court on account of error thereby assigned, which assignment of error is as follows, to wit: "The court erred in granting the order made on the 7th day of April, 1903, allowing the plaintiff to file its supplemental bill of complaint in this cause."

2.

The Supreme Court of the Territory erred in not sustaining the second assignment of error and reversing the decree of the District Court on account of the error thereby assigned, which assignment of error is as follows, to wit: "The court erred in granting the order of April 7, 1903, *allowing the plaintigg in granting the order of April 7, 1903*, allowing the plaintiff to file its supplemental bill of complaint without notice to the defendant.

141 3.

The Supreme Court of the Territory erred in not sustaining the third assignment of error and reversing the decree of the District Court on account of the error thereby assigned, which assignment of error is as follows, to-wit: "The court erred in allowing the plaintiff to file its supplemental bill in this cause, in this, to wit: the said supplemental bill of complaint was illegal and unauthorized upon the ground that the said supplemental bill alleges and sets forth a cause of action irreconsilable and inconsistent with the cause of action alleged and set forth in the original and amended bills of complaint in this cause, and the said cause of action alleged and set forth in said supplemental bill was not in existence at the time of the filing of the original and amended bills of complaint."

4.

The Supreme Court of the Territory erred in not sustaining the fourth assignment of error and reversing the decree of the District Court on account of the error thereby assigned, which assignment of error is as follows, to wit: "The court erred in allowing the plaintiff to file its supplemental bill and in permitting the subsequent proceedings thereon to the decrees without the service of process of summons upon the defendants, the said supplemental bill alleging a new and independent cause of action and a cause of action inconsistent with the cause of action alleged and set forth in the original and amended bills, and the cause of action in said supplemental bill not being in existence at the time of filing said original and amended bills and having no relation to, or connection with the cause of action alleged and set forth in said original and amended bill."

5.

The Supreme Court of the Territory erred in not sustaining the fifth assignment of error and reversing the decree of the District Court on account of the error thereby assigned, which assignment of error is as follows, to wit: "The Court erred in allowing
142 the plaintiff to file its supplemental bill of complaint, setting forth a new and independent cause of action not in existence at the time of the commencement of the original cause of action, and which said action of the court was unauthorized and not within the power of the court."

6.

The Supreme Court of the Territory erred in not sustaining the sixth assignment of error and reversing the decree of the District Court on account of the error thereby assigned, which assignment of error is as follows, to wit: "The court erred in granting the decree entered in this cause upon the said supplemental bill on the 21st day of May, 1903, said decree being illegal and unauthorized upon the ground that the court had no power to grant the same, and that the said court had not acquired jurisdiction of the parties and had not jurisdiction of the subject matter of the action."

7.

The Supreme Court of the Territory erred in not sustaining the seventh assignment of error and reversing the decree of the District Court on account of the error thereby assigned, which assignment of error is as follows, to wit: "The court erred in granting the amended decree entered in this cause upon the said supplemental bill on the 5th day of October, 1903, said amended decree being illegal and unauthorized upon the ground that the court had no power to grant the same and that the said court had not acquired jurisdiction of the parties and had not jurisdiction of the subject matter of the action."

8.

The Supreme Court of the Territory erred in not sustaining the eighth assignment of error and reversing the decree of the District

Court on account of the error thereby assigned, which assignment of error is as follows, to wit: "The court erred in its refusal to relieve the defendants from their default in not appearing to oppose the motion of April 7th, 1903, granting to the plaintiff the right to file its supplemental bill of complaint."

143 9.

The Supreme Court of the Territory erred in not sustaining the ninth assignment of error and reversing the decree of the District Court on account of the error thereby assigned, which assignment of error is as follows, to wit: "The court erred in holding that it had not the power to relieve the defendants from their default, in not appearing to oppose the motion of April 7, 1903, allowing the plaintiff the right to file its supplemental bill."

10.

The Supreme Court of the Territory erred in not sustaining the tenth assignment of error, and reversing the decree of the District Court on account of the error thereby assigned, which assignment of error is as follows, to wit: "The court erred in denying the motion of the defendants to vacate and set aside the order of April 7, 1903, which allowed the plaintiff to file its supplemental bill."

11.

The Supreme Court of the Territory erred in not sustaining the eleventh assignment of error, and reversing the decree of the District Court on account of the error thereby assigned, which assignment of error is as follows to wit: "The court erred in holding that it had not the power to set aside the order of April 7, 1903, allowing the plaintiff to file its supplemental bill."

12.

The Supreme Court of the Territory erred in not sustaining the twelfth assignment of error, and reversing the decree of the District Court on account of the error thereby assigned, which assignment is as follows, to wit: "The court erred in denying the motion of the defendants to vacate and set aside the decree entered in this cause on the 21st day of May, 1903, and the amended decree entered October 5, 1903."

144 13.

The Supreme Court of the Territory erred in not sustaining the thirteenth assignment of error, and reversing the decree of the District Court on account of the error thereby assigned, which assignment of error is as follows, to wit: "The court erred in denying the motion of defendants to vacate and set aside the decree of May 21, 1903, and the amended decree of October 5, 1903, upon the ground of want of po-er in the court to grant said motion.

14.

The Supreme Court of the Territory erred in not sustaining the fourteenth assignment of error, and reversing the decree of the District Court on account of the error thereby assigned, which assignment of error is as follows, to wit: "The court erred in denying the motion of the defendants to relieve them from their default in failing to appear and answer the proposes supplemental bill."

15.

The Supreme Court of the Territory erred in not sustaining the fifteenth assignment of error, and reversing the decree of the District Court on account of the error thereby assigned, which assignment of error is as follows, to wit: "The Court erred in denying, upon the ground of want of power in said court, to grant the motion of the defendants to relieve them from their default in not appearing to answer, plead or demur to said supplemental bill."

16.

The Supreme Court of the Territory erred in not sustaining the sixteenth assignment of error, and reversing the decree of the District Court on account of the error thereby assigned, which assignment of error is as follows, to wit: "The court erred in refusing to consider the motion of the defendants to relieve them from their default in this action; and the said Court further erred in refusing to exercise its discretion and consider the application of said defendants to relieve them from their default upon the merits."

145

17.

The Supreme Court of the Territory erred in affirming the decree of the District Court rendered in said cause.

18.

The Supreme Court of the Territory erred in adopting the findings of fact made by the District Court.

Wherefore, the appellants pray that the decree of the Supreme Court of the Territory of New Mexico, rendered in said cause be reversed.

THE RIO GRANDE DAM & IRRIGATION COMPANY,
THE RIO GRANDE IRRIGATION & LAND CO., LIMITED,
Defendants and Appellants.

(Signed) KLOCK & OWEN,
Attorneys for Defendants & Appellants.

Which said assignment of error on appeal to the Supreme Court of the United States was and is endorsed as follows, to wit:

"No. 1975. In the Supreme Court of the Territory of New Mexico, January Term, 1906. The United States of America, plaintiff and appellee, *vs.* The Rio Grande Dam & Irrigation Company

et al., defendants and appellants. Assignment of errors to be returned. Filed in my office this Aug. 27th, 1906. Jose D. Sena, Clerk."

And afterwards, *on* to wit, at the said regular term of the Supreme Court of the Territory of New Mexico, on the thirty-first day of the said regular term, the same being Wednesday the 29th day of August, A. D., 1906, the following among other proceedings were had and entered of record, following to wit:

146 No. 1075.

THE UNITED STATES OF AMERICA, Appellee,
vs.
THE RIO GRANDE DAM & IRRIGATION COMPANY ET AL., Appellants.

Appeal from Third Judicial District Court.

Not on to wit, the 29th day of August *day of August*, A. D. 1906, it is ordered that the appeal above prayed for be allowed from the said decree and judgment of the court entered in said above entitled cause on the 2nd day of March, A. D., 1906. And it is further ordered that the said appellants have leave to file additional assignments of error if they desire, and make the same a part of the record in said cause at any time before the final authentication of the record in said cause by the clerk, or at any time after the said cause may be docketed in the Supreme Court of the United States. And it is further ordered that citations issue in said cause to be served upon the counsel for the said appellee as required by the statute and rules of the court.

(Signed) WILLIAM J. MILLS,
Chief Justice of the Supreme Court of the Territory of New Mexico.

And afterwards, *on* to wit, at the said regular term of the Supreme Court of the Territory of New Mexico, on the thirty-first day of the said regular term, the same being the twenty-ninth day of August, the following among other proceedings were had and entered of record, following towit:

No. 1075.

THE UNITED STATES OF AMERICA, Appellee,
vs.
THE RIO GRANDE DAM AND IRRIGATION COMPANY ET AL., Appellants.

Appeal from District Court, Third Judicial District.

147 Now comes Messrs. Klock & Owen, attorneys for defendants and appellants and move the court that it make a statement of facts in the above entitled cause, and the court being sufficiently advised in the premises, adopt- as its own the statement

of facts made by the court below. It is therefore considered and adjudged by the court that this court adopts as its own statement of facts the statement of facts as made by the District Court in and for the Third Judicial District, whence this cause came into this court, and it is so ordered.

(Signed) WILLIAM J. MILLS,
Chief Justice, etc.

And afterwards on to wit: *on* the 25th day of September, A. D. 1906, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, a precipe for a transcript of record on appeal to the Supreme Court of the United States in the above entitled cause, which said precipe for record was and is in words and figures, following to wit:

In the Supreme Court, Territory of New Mexico.

UNITED STATES OF AMERICA, Appellee,
vs.
RIO GRANDE DAM & IRRIGATION COMPANY ET AL., Appellants.

TERRITORY OF NEW MEXICO, *ss:*

To Jose D. Sena, Clerk Supreme Court:

You are hereby required to prepare copies of the records in your office in the above entitled action of the following papers to-wit:

Original bill of complaint.
Amended bill of complaint.
Injunction.
The affidavits upon which said injunction was issued.
Proof of service of injunction on defendants.
148 The defendants' answer to said bill of complaint.
The complainant's reply.
The findings and decision of the court dismissing the complainant's bill.
Appeal to the Territorial supreme court from the judgment of dismissal.
The judgment of affirmance by the Territorial Supreme Court.
Appeal to the United States Supreme Court from the judgment of affirmance of Territorial Supreme Court.
Mandate of reversal of judgment by Supreme Court of United States.
Mandate of Territorial Supreme Court to the Third Judicial District Court.
Findings of third judicial District Court upon second trial and decision and judgment of dismissal.
Appeal to the Territorial Supreme Court from decision of the District Court.
Judgment of affirmance of Territorial Supreme Court.
Appeal from Territorial Supreme Court to the United States Supreme Court.

Judgment of reversal of the United States Supreme Court and mandate of said Court to Territorial Supreme Court.
Mandate of Territorial Supreme Court to Third Judicial District Court.
Petition for intervention by the Territory of New Mexico.
Decision of District Court and order thereon upon petition of intervention.
Order permitting the filing of supplemental complaint.
Supplemental complaint.
Decree made thereon.
Motion to amend decree.
Amended decree.
Affidavits and motion to set aside and vacate decree.
149 Order denying motion.
Exceptions to order overruling motion to open default.
Prayer for appeal and order allowing the same.
Citation.
Motion for appeal to the United States Supreme Court.
Order allowing the same.
Motion that court make statement of facts.
Assignment of errors to be returned.
Citation and all papers relating to said appeal to said United States Supreme Court, affidavit of value and all other papers on file in Territorial Supreme Court.
All of which papers with this precipe including opinion of the Territorial Supreme Court are to be included in the record in this case to be certified by you.

Which said precipe for transcript was and is endorsed as follows to-wit:
"No. 1075. In the Supreme Court of the Territory of New Mexico. January Term, 1906. The United States of America, appellee, *vs.* The Rio Grande Dam & Irrigation Co. *et al.*, Appellants. Precipe for transcript of record filed in my office this Sep. 25, 1906. Jose D. Sena, Clerk."

And heretofore, on to wit, *on* the second day of March A. D., 1906, there was filed in the office of the clerk of the Supreme Court of the Territory of New Mexico, an opinion by the court in the above entitled cause, which said opinion by the court, was and is in words and figures, following to wit:

150 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

No. 1075.

UNITED STATES OF AMERICA, Appellee,
vs.
RIO GRANDE DAM AND IRRIGATION COMPANY ET AL., Appellant.

Appeal from District Court, Third Judicial District.

Appeal from the United States Court of the Third Judicial District.

Before Hon. Frank W. Parker, Associate Justice.

Statement of the Case.

This cause was remanded a second time to the District Court of the Third Judicial District by the Supreme Court of the Territory, April 28th, 1902, under a mandate from the Supreme Court of the United States, by which Court the same had been reversed and remanded for the second time, for further proceedings therein.

On the 7th day of April, 1903, and during a regular term of said Court, the appellee applied for and obtained leave to file a supplemental complaint, and upon the same day filed the same. The record shows that upon the same day, the supplemental complaint was filed the same was served upon Mr. A. B. Fall Esqr., one of the attorneys of record of the appellants.

On the 21st day of May, and forty-four days after the supplemental complaint was filed and served upon appellants' counsel, no answer or other pleading being filed, the Court rendered the following decree of forfeiture and injunction, in favor of the appellee:

"This cause coming on to be heard upon the motion of the plaintiff, by the United States Attorney W. B. Childers, Esq., and it appearing to the Court that a supplemental bill was filed herein, by its leave, on the seventh day of April, A. D. 1903, and that
151 copies of the said bill were served more than thirty days past upon the attorney of record of the defendants in said cause, and it further appearing from the certificate of the clerk of the said Court that no demurrer, answer or other pleading has been filed to said supplemental bill by the defendants in said cause, and the Court being fully informed in the premises, the Court does find that the allegations of said supplemental bill are confessed and are true; and further specially finds that the articles of incorporation and the map, survey of the reservoir of the defendant corporation, the Rio Grande Dam and Irrigation Company, were filed with the Secretary of the Interior prior to the twenty-sixth day of June, A. D., 1897, and were prior to said date approved by the Secretary of the Interior; and it further finds that the said defendants have not completed *its* said reservoir or said ditch, or any section thereof, within five years after the location of the said reservoir and *its* said ditch

line, or within five years after the approval of the same by the Secretary of the Interior, and the Court further finds that five years since the filing and approval of the said articles of incorporation, proof or organization, maps and surveys of the said reservoir and ditch line of the defendants had long since lapsed prior to the filing of the said supplemental bill and that the defendants had not complied with the requirements of the Act of Congress, approved March 3, 1901, under which the same were filed but has failed to construct or complete within the period of five years after the location of the said canal and reservoir and part or section of the same.

"Whereof, it is Ordered, adjudged and decreed by the Court that the rights of the said defendants, or either of them, to construct and complete, the said reservoir and said ditch, or any part thereof, under and by virtue of the said Act of Congress of March 3, 1901, be and the same are hereby declared to be forfeited.

"It is further ordered, adjudged and decreed by the Court by reason of the premises that an injunction be, and the same is hereby granted against the said defendants, enjoining them from con-
152 structing or attempting to construct the said reservoir, or any part thereof, and that the same be made perpetual."

An error having been made in the decree as to the date of the approval of the Act of Congress, in that it was given as "1901" whereas it should have been 1891 an amended decree was entered *nunc pro tunc* inserting 1891 instead of 1901, that said decree would conform to the allegation of the supplemental complaint.

The original decree, thus amended, was re-entered at length on the 5th day of October, 1903, during a regular term of said court, no appearance or action of any kind having been taken by appellants up to this time.

On the 31st day of October 1903 a motion was filed, by counsel for appellants, Messrs. Klock & Owen, to vacate and set aside the order of April 7th, 1903, allowing the supplemental complaint to be filed; to open the default; to vacate and set aside the decree and amended decrees of the Court, and for permission to file answer which was tendered with said motion.

Long affidavits of Nathan E. Boyd and Allen Wood Ellington, stockholders of appellant corporation were filed in support of the motion. The answer which was also verified raises substantially the same issues sought to be raised by the motion and denies appellees right to relief by way of supplemental complaint for reasons preserved in the assignments of error. On the 29th day of January, 1904, the Court overruled the motion and entered the following order:

"This cause coming on to be heard upon the motion of the defendants, The Rio Grande Dam and Irrigation Company and the Rio Grande Land and Irrigation Company, Limited, to vacate and set aside the order entered in this cause on the 7th day of April, A. D. 1903, at Las Cruces, Dona Ana County, New Mexico, granting to the plaintiff herein the privilege and right to file a supplemental bill of complaint in this cause, and praying leave of the Court to oppose said motion for leave to file said supplemental bill of
153 complaint and permit the defendants to have a hearing thereon, and that the order granting to the plaintiff herein

the privilege and right to file said supplemental bill of complaint be vacated and set aside upon the ground that the court had no power to permit the plaintiff to file said supplemental bill of complaint and praying that the decree entered in this cause upon the default of the defendant in answering the said supplemental bill of complaint be vacated and set aside and declared to be of no effect and that the amended decree in this cause filed in this Court on the 5th day of October, 1903, upon said plaintiff's application be vacated and set aside and held of no effect said decree having been granted upon defendants' default to answer said supplemental bill of complaint and that the defendants herein should this court determine not to relieve said defendants from that default upon said motion of plaintiff or file said supplemental bill of complaint be permitted to come in and answer said bill of complaint and present their issues on the merits of said supplemental bill of complaint and to relieve defendants from their default therein and that the defendants have such other and further relief as to this Court may seem just and equitable.

"And the court having heard counsel for the plaintiff and defendants and being fully advised in the premises doth find that the motion for leave to file said supplemental bill of complaint was served upon the attorneys of record of said defendants and that there was no irregularity in the filing of said supplemental bill of complaint, and that it has no power to set aside the decree entered upon said bill at this time upon said application, doth overrule said motion."

Opinion of the Court.

McFIE, *J.*:

A large number of errors are assigned, but they may fairly be grouped into four, namely:

1st. The Court erred in permitting the supplemental complaint to be filed.

2nd. The Court erred in rendering decree upon default of
154 appearance and answer within the time allowed by law.

3rd. The Court erred in its order modifying original decree *nunc pro tunc*.

4th. The Court erred in over-ruling motion to vacate said order and decrees and to reopen said cause for the filing of an answer.

As to the first objection, it would seem to be a sufficient answer that at the time the court granted appellee leave to file the supplemental complaint the Court was in session during a regular term. It was not a vacation order, therefore, but one made in open Court.

This is a matter of practice and governed by the Code of Civil procedure. Sub-Section 104 of the Code as amended by Chap. 11 Laws of 1901, provides that

"Any hearing of any kind, whether interlocutory or final, unless trial by jury is necessary, may be had in any case out of regular term time upon five days' notice, in writing to the opposite party, or his attorney or solicitor, but the court or judge may, upon application, for good cause shown, extend the time of hearing. Such hear-

ing may be had during the term of court at any time in the discretion of the court."

Counsel for appellants, insists, that it was error for the Court to allow the filing of the supplemental complaint without notice. The section above referred to, provides for notice of five days for hearings in vacation but there is no such requirement as to hearings in open Court during a regular term. The record discloses that this cause had been pending in the Court for almost one year, awaiting further proceedings, and Mr. Boyd in his affidavit admits Mr. A. B. Fall and Mr. W. A. Hawkins were attorneys of record for appellants at the time the suplemental complaint was filed. The record further shows that the supplemental complaint was served upon Mr. Fall on the same day it was filed April 7th, 1903. Attorneys of record are presumed to be present during terms of Court wherein their causes are pending, and in contemplation of law chargeable with notice of all proceedings transpiring in open court in causes wherein they are such attorneys. There being no requirement for five days notice, under the facts of this case, counsel are presumed to have been present and to have such notice as the law requires of matters transpiring in open court on the day on which leave was granted to file the supplemental complaint, and the same was filed and served upon them. Younge *vs.* Broxson 23 Ala., 684; Sanders *vs.* Savage, 63 S. D., 218.

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The Court was vested with discretion by the last clause of Sec. 104 *supra* which does not seem to have been abused, nor was there any abuse of the general discretion to allow an amended or supplemental bill in equity conferred upon the Courts of the United States as may be seen by reference to the case of Berliner Gramophone Co. *vs.* Seamon 113 Fed. Rep. 750 in which it was held that,

"The granting of leave to file an amended and supplemental bill is a matter within the discretion of the Court, and its action will not be reviewed in an appellate court unless there has been a gross abuse of this discretion."

The second group of errors assigned, relate both to the order allowing the supplemental complaint to be filed and the rendering of the decree and amended decree thereon, and challenges the power of the Court to do either, 1st, because the supplemental complaint sets up a cause of action irreconcilable and inconsistent with the cause of action set forth in the Original and amended complaints. 2nd. It sets up an independent cause of action which did not exist when the Original and amended complaints were filed, 3rd, because the decrees were rendered without service of summons.

That the court has power to allow a supplemental complaint to be filed appears from sub-sections 87 and 89 of the Code which are as follows:

"SUB-SEC. 87. A party may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the cause, or praying for any other or different relief, order or judgment."

"SUB-SEC. 89. In every complaint, answer or reply, amendatory or supplemental, the party shall set forth in one entire pleading all matters which, by the rules of pleading, may be set forth in such

pleading, and which may be necessary to the proper determination of the action or defense.

It being understood that our Code provides for the blending of legal and equitable remedies and defenses in one action, sub-sec. 33 code, these sections clearly allow the allegation of such facts as
156 will authorize the granting of other and different relief than that sought by the original complaint, the object of course being to end the litigation in a single action.

This court had this subject under consideration in the case of Breemen Min. & Mill. Co., *vs.* Breemen 79 Pac. 806. In that case this Court said:

"The only limitation upon the right of amendment to be drawn from a majority of the decided cases is that an entirely new and different cause of action, founded upon facts wholly foreign to the transaction attempted to be set up in the original complaint cannot be set up by amendment." Ency. Pl. & Pr. Vol. 1, 548.

In the present case, the matter set up in the supplemental complaint grows out of and is connected with the same transaction as that alleged in the original and amended complaint. The original complaint alleged that the Rio Grande was a navigable stream, and as such under the jurisdiction of the United States; that the Rio Grande Dam and Irrigation Company, threatened, and were about to commence the construction and maintenance of numerous dams, reservoirs, canals, ditches and pipe lines for the purpose of accumulating large quantities and possible all of the waters of the Rio Grande into such reservoirs, canals, ditches and pipe lines to be used in irrigating large tracts of land; that the construction of the large dam at Elephant Butte, will check the flow of the waters of such stream and interfere with or destroy the navigability and commercial value thereof; alleged that the said acts were in violation of certain acts of Congress therein set forth and prayed for injunction restraining the defendant Co. from proceeding with the -onstruction of its proposed irrigation system. The amended complaint was in the main identical with the original, except in that it made the Rio Grande Irrigation and Land Company, Limited, also a defendant and contained allegations to the effect that the latter company was an English corporation organized as an adjunct and agent of the former Company, for the purpose of securing funds for the Construction of the Irrigation system and that the Rio Grande Dam & Irrigation Co. had entered into a contract to convey all of their rights in such system to the
157 latter company. The prayer for injunction is the same, but against both corporations.

An alternative writ of Injunction having issued, by order of the Court, on the 25th day of May, 1897, on the 25th day of June the defendant corporation filed joint and separate pleas and answer, denying the navigability of the Rio Grande; denying that the proposed action of the defendant corporation was unlawful and alleging full compliance with the acts of Congress authorizing the construction of such irrigation system, part of which pleas and answer is as follows:

"That such application, map and survey of such dam and reservoid has — a long time prior hereto and prior to the filing of the bill of complaint herein been approved by the secretary of the Interior of

the United States, and is yet so approved, and the construction of such dam and reservoir duly authorized under the provisions of an Act of Congress of March 3, 1891, under which said application for such right to construct such dam and reservoir was duly made as aforesaid."

On the 27th day of June, Counsel for the defendant corporations, filed a motion to discharge the rule to show cause and dissolve the injunction upon the pleas, answer, affidavits and correspondence on file. This motion was fully argued and was sustained by the Court, the Court gave as reasons, that it would take judicial notice that the Rio Grande was not a navigable stream within the territory of New Mexico and therefore the amended complaint failed to state a case entitling the complainant to the relief sought. The court dissolved the injunction and dismissed the cause.

There was no trial upon the merits in the court below, and when the cause was heard in the Supreme Court of the United States it was held that the lower court erred in dismissing the bill for want of equity, upon the sole ground that the Rio Grande was — not to be non-navigable in New Mexico, as to the navigability of the river outside of the Territory was also within the scope of the bill.

Now was the second reversal by the Supreme Court of the United States a reversal upon the merits as the court distinctly placed it upon the ground that the United States had not been allowed sufficient time to properly prepare and present its case, and the cause
158 was remanded for that reason. As there has never been a trial upon the merits of the original cause of action, that matter was still before the lower court upon the remanding of the cause, but the matter set up in the supplemental complaint was never before the court until after the case had been remanded for the second time, the mandate therefore could not refer to issues thus raised for the first time so as to prohibit their consideration.

"The circuit court may consider and decide any matters left open by the mandate of this court and its decision of such matters can be reviewed by a new appeal."

In re Sanford Tool Co., 160 U. S., 225; Hinckleys *vs.* Morton 103, U. S., 764; Mason *vs.* Pewabic Mining Co., 153, U. S., 361.

159 The supplemental complaint contains a detailed statement of all the proceeding had during the progress of the case and to the pleadings and specifically to the pleas filed by the appellants in which they rely upon the Act of Congress of March 3rd, 1891, as authority for the construction of their irrigation system.

The supplemental complaint further alleges that:

"Plaintiff further alleges that in and by section twenty of the said Act of March 3rd, 1891, above referred to, it was provided 'that if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch or reservoir, to the extent that the same *is* not completed at the date of forfeiture,' and that although five years since the filing and approval of said articles of incorporation, proofs of organization, maps and surveys have long since elapsed, defendant has not complied with

the requirements of said act, but has failed to construct or complete within the perio*f* of five years after the location of said canal and reservoir any part or section of the same, and the same has by reasons thereof become forfeited."

It is further alleged in the supplemental complaint that the temporary injunction was dissolved on the 30th day of July, 1897 and that the appellants were in "no wise hindered, restrained or prevented from complying with the provisions of the act, by any judicial order or process whatsoever."

The prayer is for forfeiture of all the rights the appellants may have or claim under said act of Congress of March 3rd, 1891 and for injunction and all other relief prayed for in the amended complaint.

Under this state of the record, the objection that the supplemental complaint sets up a cause of action irreconcilable and inconsistent with the amended complaint is not well taken. Indeed the prayer of the supplemental complaint is for the identical relief prayed for in the amended complaint. It is true that a forfeiture of the right of appellants to construct their irrigation system, is also prayed for but this only amounts to an additional reason why an injunction should be granted. The purpose of this entire litigation has been to restrain appellants from constructing the dams, reservoirs, canals,
160 ditches &c. for the diversion of the waters of the Rio Grande and the obstruction of the alleged navigable portion of said river.

The supplemental complaint is entirely consistent and reconcilable with this purpose.

The next objection to the filing of the supplemental complaint and the decree rendered thereon,—that it sets up an entirely independent cause of action,—is equally untenable. The plea of the appellants, above referred to, relies upon the Act of Congress of March 3rd, 1891, as the bases of all rights claimed by appellants. The forfeiture sought by the supplemental complaint is provided for in the same act. The supplemental complaint, therefore, is directly responsive to this defense and clearly grows out of the same transaction or subject matter of the litigation.

The third objection is, that the supplemental complaint sets up a cause of action which did not exist at the time the suit was brought. This is true, but a supplemental complaint seems to be the proper method of bringing such a cause of action before the Court. Such seems to be the office of a supplemental complaint.

The case of Jenkins *vs.* International Bank, 127 U. S., 484, is a case wherein a judgment was pleaded in aid of the plaintiffs, which had been rendered after the commencement of the original suit. The Court said:

"Having been rendered after institution of the present suit, it was competent for the complaint to bring it forward by a supplemental bill as conclusive evidence of the amount due for which it was entitled to take a decree, and as a complete answer to the defense set up by the plaintiff in error as the assignee of the bankrupt to the relief prayed for in the original bill, and to the relief sought by the cross bill. *It* was strictly new matter arising after the filing of the bill, properly set up by was of supplemental bill, in support of the

relief originally prayed for. It can in no sense be considered as a new cause of action."

In Cedar Valley Land and Cattle Co. *vs.* Coburn, 29 Fed. 387, The Court said:

"Now it is insisted that if any thing had transpired since the filing of the original bills and cross bills, changing and affecting the issues, such new matters should have been presented by supplemental bill. I think counsel are right and that such is the true practice."

161 Cooper *vs.* Filsher, 1 Bond 440;
N. Y. Security & Tr. Co. *vs.* Lincoln St. Ry. Co., 74 Fed. 67;
Hazelton Tripod Borter Co. *vs.* Citizens' St. Ry. Co., 72 Fed. 325;
Maynard *vs.* Green, 30 Fed. Rep. 645.

In Candler *vs.* Pettit, 19 American Dec. and note cited by appellants, it is held that a supplemental bill may be filed where the original bill states a cause of action. Tested by this rule, there was a clear right to file the supplemental Complaint, as the Supreme Court of the United States in effect held when it reversed the lower court's ruling that the amended bill did not state a cause of action.

The authorities above referred to are deemed sufficient to show that all of the objections to the order allowing the supplemental complaint to be filed and to the rendition of the decrees thereon, must be overruled.

It is further insisted by Counsel for appellants, that the Court had no jurisdiction of the parties or the subject matter and therefore no power to render a decree.

As the court undoubtedly had jurisdiction both of the parties and the subject matter of the action throughout the prior proceedings, the Court did not lose either by the remanding of the cause. The filing of the supplemental complaint, under the circumstances of this case "can in no sence be considered new cause of action." Jenkins *vs.* International Bank *supra*, it was not necessary for new process to issue and that there be service of the same. It was filed in open court and a copy was served upon one of the attorneys of record on the 7th day of April, 1903, and this was sufficient. No appearance having been entered and no answer or other pleading filed, a decree was rendered on the 21st day of May, 1903, declaring a forfeiture of all the right of the appellants to construct or complete the proposed irrigation system or any part thereof, and granting a perpetual injunction. At the next regular term of the court there still being no appearance or pleading on behalf of the appellants it appearing that there had been a clerical mistake made in the original decree, in that the date of the Act of Congress was
162 given as 1901, when it should have been 1891, the court ordered that the decree be modified so as to correct what was evidently a purely clerical error, as the supplemental complaint gave the date as 1891 and the decree thus modified was re-entered in full. There was no error in this action of the court as our Code authorizes such action. Sub-sec. 85 Code.

On the 31st day of October, 1903, Messrs. Klock & Owen attorneys for appellants filed a motion to set aside and vacate the order allow-

ing supplemental complaint to be filed and the decree rendered and that they be allowed to file an answer, which was tendered with the motion, and to make defense to the action. This motion was overruled upon the ground that there was no irregularity in the proceedings and that the court was not warranted in vacating the order and decree.

Appellants assign error in this ruling.

There being no error or irregularity in the court's order allowing the supplemental complaint to be filed, the same having been done in open court, and a copy of the same having been served upon one of the attorneys of record on the same day on which it was filed, the statute required an answer or other proper pleading to be filed within twenty days from the date of such filing and in the event of failure to plead or secure additional time to plead, neither of which were done in this case, it was perfectly regular for the court to render decree. Gregory *vs.* Pike, 29 Fed. 588. Appellants seek to be relieved from their own default by alleging neglect on the part of their attorneys. Mr. Boyd in his affidavit admits that Mr. Fall, was at the time, one of the attorneys of record of appellants. Mr. Boyd does not deny that a copy of the supplemental complaint was served upon Mr. Fall nor does he state when the document was received by him. He states "that after the 7th day of April, 1903, the deponent while at Philadelphia, Pa., received from J. H. McGowan by mail what purported to be a proposed supplemental bill of complaint in behalf of complainant." Mr. McGowan was also an attorney of the appellant-.

163 Mr. Boyd further admits that he had actual notice that the decree had been rendered October 19th, 1903. More than ten days having elapsed after this notice before this motion was filed and long after the decree was rendered, it could not be entertained under sub-sec. 134 of the Code which provides that a motion to set aside a judgment rendered out of term time will not be entertained unless the same is filed and a copy served upon the opposite party within ten days after such finding or judgment was rendered. The motion, therefore, must be made under sub-sec. 137 of the Code which provides that "Judgments may be set aside for irregularity, on motion filed at any time within one year after the rendition thereof."

As has been pointed out there was no irregularity in the rendition of this judgment.

Notice to an attorney of record is notice to client. 3 Am. & Eng. Ency. of Law 2nd Ed. 3203. The client cannot plead negligence of his attorneys as grounds of relief. A. & E. Ency. of Law, 2nd Ed. 324; Putman *vs.* Day, 22 Wall., 64; Terry *vs.* Commercial Bank, 92 U. S., 454.

There being service of a copy of the supplemental complaint upon one of the attorneys of record on the day on which it was filed it was entirely regular for the Court to render the decree when applied for 44 days after such service, in the absence of any appearance or pleading by the appellants. It is immaterial whether Mr. Boyd had notice or not as he was not a party to the suit except as a director or the corporations or other officer thereof, but the appellant cor-

porations were the parties to the suit and they were represented by attorneys of record upon whom service was made. It is but fair to Mr. Fall to presume from Mr. Boyd's affidavit, that he did forward the copy of the supplemental complaint served upon him to his co-counsel Mr. McGowan as soon as the same was delivered to him, as the affidavit says it was not received until after April 7th, 1903, this being the same date on which the same was served upon
164 Mr. Fall. However that may be, the court below distinctly found that no irregularity had intervened in the rendition of the decree and over-ruled the motion for that reason, and we see no error in the action of the Court.

From the views above expressed, it is apparent that it is not necessary to consider the answer tendered with the motion and the filing of the same was refused for the same reason that justified the overruling of the motion.

Appellant- insists that they were restrained from constructing their irrigation system by the United States, and therefore no right of forfeiture existed but the record before us shows, that the injunction originally granted was dissolved July 30th, 1897, and was never reinstated. The injunction granted upon the declaration of forfeiture, was more than five years after the dissolution of the former injunction, this contention therefore does not appear to be well founded.

There being no error presented by the record in the case, the judgment of the Court below will be affirmed. It is so ordered.

JOHN R. McFIE,
Associate Justice.

We concur:
WILLIAM J. MILLS, *C. J.*
WILLIAM H. POPE, *A. J.*
EDWARD A. MANN, *A. J.*
IRA A. ABBOTT, *A. J.*

Parker, J., having heard the case below, did not participate in this decision.

165 TERRITORY OF NEW MEXICO:

Supreme Court.

I, the undersigned, clerk of the Supreme Court of the Territory of New Mexico, do hereby certify that the above and foregoing one hundred and sixth-four (164) pages contain a full, true, perfect and complete copy of the record and proceedings, pleadings and opinion filed in the above entitled cause which is transmitted to the Supreme Court of the United States, in accordance with an appeal herein heretofore granted by this Court, as the same appear of record and remain on file in my office.

Witness my hand and the seal of the Supreme court of the Territory of New Mexico this the 28th day of September, A. D., 1906.

[Seal Supreme Court, Territory New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

166 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1906.

THE UNITED STATES OF AMERICA, Plaintiff and Appellee,
vs.
THE RIO GRANDE DAM & IRRIGATION COMPANY and THE RIO GRANDE IRRIGATION & LAND COMPANY, LIMITED, Defendants and Appellants.

Citation.

The Rio Grande Dam & Irrigation Company and the Rio Grande Irrigation & Land Company, Limited, to the United States of America, Hon. William H. Moody, Attorney General thereof, and to Hon. W. H. H. Llewellyn, United States Attorney for the Territory of New Mexico, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be held at Washington, D. C., commencing in October, 1906, within sixty days from the date of this citation, pursuant to an appeal taken from the Supreme Court of the Territory of New Mexico, wherein the Rio Grande Dam & Irrigation Company and the Rio Grande Irrigation & Land Company, Ltd. were appellants and the United States of America was appellee, to show cause, if any there be, why the judgment rendered against the said appellants as the said appeal mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 29th day of August, A. D., 1906.

WILLIAM J. MILLS,
Chief Justice of the Supreme Court of the Territory of New Mexico.

[Seal Supreme Court, Territory New Mexico.]

167 TERRITORY OF NEW MEXICO,
County of Bernalillo, ss:

Harry P. Owen, of said county being duly sworn, says that he is of lawful age and a member of the law firm of Klock and Owen attorneys for the defendants in the action described in the annexed citation; that on the 24th day of September, 1906 at the city of Albuquerque, New Mexico, deponent served the annexed citation upon Hon. W. H. H. Llewellyn, United States attorney for the Territory of New Mexico, by handing to and leaving with said W. H. H. Llewellyn, a true copy thereof; that deponent read the said original citation to the said Llewellyn, and exhibited to him the signature of Honorable W. J. Mills, Chief Justice of the Supreme Court of the Territory of New Mexico subscribed to said original citation; that deponent knew the said Llewellyn to be the United States attorney for the Territory of New Mexico; that said service was personally made upon the said Llewellyn.

HARRY P. OWEN.

Subscribed and sworn to before the undersigned on this September 25th, 1906.

[Seal Adela C. Holmquist, Notary Public, Bernalillo County, N. M.]

ADELA C. HOLMQUIST,
Notary Public.

[Endorsed:] Citation.

Endorsed on cover: File No. 20,959. New Mexico T. supreme court. Term No. 237. The Rio Grande Dam & Irrigation Company and The Rio Grande Irrigation & Land Company, Limited, appellants, *vs.* The United States. Filed January 6th, 1908. File No. 20,959.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 49.

THE RIO GRANDE DAM AND IRRIGATION COMPANY AND THE RIO GRANDE IRRIGATION AND LAND COMPANY, LIMITED, APPELLANTS,

vs.

THE UNITED STATES.

BRIEF FOR PLAINTIFFS IN ERROR.

CHARLES A. DOUGLAS,
WILLIAM W. BRIDE,
FREDERICK S. TYLER,
Attorneys for Plaintiffs in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 49.

THE RIO GRANDE DAM AND IRRIGATION COMPANY AND THE RIO GRANDE IRRIGATION AND LAND COMPANY, LIMITED, APPELLANTS,

vs.

THE UNITED STATES.

Statement of the Case

This case now comes before your honors for the third time. The facts, stated as briefly as may be, are as follows:

The case was originally begun on May 24, 1897, when the original bill of complaint was filed by the United States in the District Court of the Third Judicial District of the Territory of New Mexico.

The bill abounds in allegations which assail the legality of the enterprise to carry on which the Rio Grande Dam and Irrigation Company was organized. This enterprise was, briefly stated, to construct a dam in and across the Rio Grande River at a place called Elephant Butte, in the Territory of New Mexico, to supply water to be stored in reservoirs, canals, ditches, and pipe lines, to be used for purposes of irrigation.

The bill prayed, among other things:

"That a provisional or preliminary injunction be issued restraining the said defendant, the Rio Grande Dam & Irrigation Company from beginning, commencing, attempting, building, creating, obstructing or maintaining any obstruction to the navigability of said waters thereof in said Territory by any of the means heretofore mentioned in this bill to wit by means of a dam, breakwater, weir, piles, structure, or other obstruction." (Record, p. 5.)

A temporary injunction was granted by the district court on May 25, 1897, the mandate of the injunction being as follows:

"That you (the defendant), do absolutely desist and refrain from beginning, commencing, attempting, building, constructing, creating or maintaining any dam, breakwater, weir, structure, or other obstruction of any character whatsoever across the Rio Grande River in the waters thereof, in the Territory of New Mexico, and especially at Elephant Butte, or at any point thereon in said judicial district, or in any manner to begin the construction of or to construct or create any structure or dam or other obstruction of any character whatsoever in such manner and to such extent as shall affect the navigable capacity of said Rio Grande River in said Territory of New Mexico, until the further order of this court." (Record, p. 16.)

This injunction was served on the defendant May 31, 1897. (Record, p. 16.)

On June 21, 1897, the United States filed an amended bill by which the Rio Grande Irrigation and Land Company, Limited, was made a party defendant. (Record, p. 6.) This amended bill contained substantially all of the allegations of the original bill and prayed that a perpetual injunction be issued against the two defendant companies, the Rio Grande Dam and Irrigation Company and the Rio Grande Irrigation and Land Company, Limited. Record, p. 6.)

On June 25, 1897, the defendants filed their plea and answer to said amended bill and thereby raised an issue as to all of the allegations of the amended bill. (Record, p. 17.)

The cause was thereafter heard upon the issues raised by the pleadings and the plaintiff's bill was dismissed, the order dismissing the bill being entered on July 30, 1897. (Record, pp. 25-6.)

The plaintiff thereupon noted and later perfected an appeal to the Supreme Court of the Territory of New Mexico, which appeal by stipulation of counsel (Record p. 27) and consent of the court was heard upon the original papers as filed in the district court, a rule to send up the original papers having been issued. (Record, pp. 26 and 27.)

The Supreme Court of the Territory of New Mexico affirmed the decree of the district court; whereupon the complainant appealed to the Supreme Court of the United States. On May 21, 1899, this court reversed and remanded the case (174 U. S., 690), and in pursuance of that reversal the Supreme Court of the Territory of New Mexico on July 15, 1899, sent its mandate to the district court, directing that the decree of dismissal be set aside and—

"order an inquiry into the question, whether the intended acts of the defendants in the construction of a dam and the appropriation of the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of its present navigability, and if so to enter a decree restraining those acts to the extent that they will so diminish."

"Now, therefore, you are hereby commanded to reinstate said cause upon your docket and set aside said decree of dismissal therein and to reinstate the bill of complaint, and proceed in accordance with the terms of said mandate of the Supreme Court of the United States." (Record, p. 28.)

Thereafter the case was restored to the docket of the district court and a large volume of testimony taken. The district court again dismissed the bill upon the merits, the court having first made very elaborate findings of facts, by

which findings the allegations of the plaintiff were not sustained. (Record, pp. 29-41.)

A motion for a rehearing was made by the attorneys for the United States (Record, p. 41), which motion was by the court on January 9, 1900, overruled. (Record, p. 48.)

From the second decree of dismissal the complainants again appealed to the Supreme Court of the Territory, which court affirmed the decree of the district court. (Record, p. 49.)

From that court the case was brought for the second time before the Supreme Court of the United States, and on March 3, 1902, the Federal Supreme Court reversed the decree and remanded the case to the Supreme Court of the Territory of New Mexico, with directions to reverse the decree of the district court and remand the case with leave to both sides to produce further evidence (Record, pp. 49 and 50), the said mandate directing as follows:

"And it is further ordered that this cause be, and the same hereby is remanded to the said Supreme Court with directions to reverse the decree of the district court and to remand the cause to that court with directions to grant leave to both sides to adduce further evidence. March 3, 1902."

"You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding." (Record, p. 95.)

No proceedings whatever were had in the district court pursuant to this mandate of the Supreme Court of the United States, and no evidence whatever was produced by either party in conformity with its directions.

On April 7, 1903, the complainants applied to the Third Judicial District Court of New Mexico by *ex parte* application to be allowed to file a supplemental bill in this cause. (Record, p. 54.) No notice of this application was given to the defendants.

The purpose of said supplemental bill was to forfeit all of the rights granted to the defendant companies (the plaintiffs in error here), under the act of March 3, 1891.

The court granted the application on the same day it was filed and immediately thereafter the complainant filed its supplemental bill. (Record, p. 54.)

On May 21, 1903, a decree was entered *pro confesso* against the defendants on certificate being made of the defendants' default (Record, p. 59), in that they did not plead to the supplemental bill. This decree granted the relief prayed for in the supplemental bill. (Record, p. 59.)

On October 5, 1903, the complainant moved to be allowed to file an amended decree (Record, p. 61), and on the same day said motion was granted (Record, p. 62), and the amended decree entered. (Record, pp. 63 and 64.)

A copy of the supplemental bill was served on A. B. Fall, one of the attorneys of record of the defendants, May 7, 1903. (Record, p. 58.)

On October 31, 1903, the defendants filed their motion to be relieved from their default in not appearing to oppose the motion made on April 7, 1903, which allowed the complainant the right to file its supplemental bill, and further relief was asked by said motion to permit the defendants to be relieved from their default in not appearing and pleading to said supplemental bill. (Record, p. 64.)

The court overruled the motion of the defendants. (Record, pp. 83 and 84.) The defendants thereupon prayed an appeal to the Supreme Court of the Territory of New Mexico, which appeal was allowed. (Record, p. 85.)

On March 2, 1906, the Supreme Court of New Mexico affirmed the decree of the district court in an opinion by Mr. Justice McFie. (Record, p. 112.)

From that decision the case is now brought before your honors for the third time.

ARGUMENT.

Eighteen assignments of error have been reserved by the plaintiff in error in this case. The first five assignments of error are so nearly akin, that for the sake of brevity and convenience we shall combine our suggestions relative to them.

FIRST FIVE ASSIGNMENTS OF ERROR.

1.

The Supreme Court of the Territory erred in not sustaining the first assignment of error and reversing the decree of the district court on account of error thereby assigned which assignment of error is as follows, to wit: "The court erred in granting the order made on the 7th day of April, 1903, allowing the plaintiff to file its supplemental bill of complainant in this cause."

2.

The Supreme Court of the Territory erred in not sustaining the second assignment of error and reversing the decree of the district court on account of the error thereby assigned, which assignment of error is as follows, to wit: "The court erred in granting the order of April 7, 1903, allowing the plaintiff to file its supplemental bill of complaint without notice to the defendant."

3.

The Supreme Court of the Territory erred in not sustaining the third assignment of error and reversing the decree of the district court on account of the error thereby assigned, which assignment of error is as follows, to wit: "The court erred in allowing the plaintiff to file its supplemental bill in this cause, in this, to wit: the said supplemental bill of complaint was illegal and unauthorized upon the ground that the said supplemental bill alleges and sets forth a cause of action irreconcilable and inconsistent with the cause of action alleged and set forth in the original and amended bills of complaint in this cause, and

the said cause of action alleged and set forth in said supplemental bill was not in existence at the time of the filing of the original and amended bills of complaint."

4.

The Supreme Court of the Territory erred in not sustaining the fourth assignment of error and reversing the decree of the district court on account of the error thereby assigned, which assignment of error is as follows, to wit: "The court erred in allowing the plaintiff to file its supplemental bill and in permitting the subsequent proceedings thereon to the decrees without the service of process upon the defendants, the said supplemental bill alleging a new and independent cause of action and a cause of action inconsistent with the cause of action alleged and set forth in the original and amended bills, and the cause of action in said supplemental bill not being in existence at the time of filing said original and amended bills and having no relation to, or connection with, the cause of action alleged and set forth in said original and amended bill."

5.

The Supreme Court of the Territory erred in not sustaining the fifth assignment of error and reversing the decree of the district court on account of the error thereby assigned, which assignment of error is as follows, to wit: "The court erred in allowing the plaintiff to file its supplemental bill of complaint, setting forth a new and independent cause of action not in existence at the time of the commencement of the original cause of action, and which said action of the court was unauthorized and not within the power of the court."

Under these assignments the plaintiffs in error contend that no proceedings inconsistent with the opinion and mandate of the Supreme Court of the United States could be had in the district court, or in the Supreme Court of New Mexico, and that the filing of the complainant's supplemental bill was in direct conflict with that opinion and mandate.

The district court did not follow the mandate of the Supreme Court of the United States when it admitted the

filing of and later when it made its decree upon the supplemental bill.

When the cause was previously heard in this court, a mandate was sent down directing that leave be granted to both sides "to adduce further testimony." If the record in the previous hearing had contained sufficient evidence of a material character, the case would have been decided upon its merits at that time. It was only because of this failure of sufficient evidence that the cause was sent down at all.

The mandate is specific. It orders that "leave should be granted to both sides to adduce further testimony." Can it be maintained that the court obeyed this mandate when it allowed the filing of a supplemental bill and entered a decree which prevented both sides from "adducing further testimony"? It was in direct opposition to the mandate of the United States Supreme Court, for instead of "allowing both sides to adduce further testimony," it shut off all proceedings by entering a decree upon the supplemental bill.

It is therefore contended that when the case was referred with a specific direction, the court erred in allowing the filing of a bill which was outside that direction and in contravention to it.

The power of the lower court to go outside the mandate and to allow the performance of acts inconsistent therewith has many times been frowned upon by this court. In West *et al. v.* Brashear, 39 U. S., 54, Chief Justice Taney in delivering the unanimous opinion of the court held that "where the direction in a mandate of the Supreme Court is precise and unambiguous it is the duty of the court to carry it into execution and not look elsewhere for authority to change its meaning."

Southard *v.* Russell, 57 U. S., 547.
Ex parte Dubuque R. R. Co., 68 U. S., 69.
Armes *v.* Kimberly, 136 U. S., 628, and
In re Gamewell F. A. T. Co., 73 Fed., 908.

Could a direction be plainer than to allow both sides to adduce further testimony? Was not that "precise," was it "ambiguous," and did the court "carry it into execution"?

The general law of the States is to the same effect and the same doctrine has been laid down in numerous decisions. In Mason *v.* Harpers Ferry, 20 W. Va., 223, the court held that "when the Supreme Court sends its mandate to the court below to be executed, the lower court cannot examine it for any other purpose than to execute it, nor can it give further relief." In Boggs *v.* Willard, 70 Illinois, 315, we are told that "when a cause has been remanded by the Supreme Court to the court below, with specific directions as to how the court shall proceed, the lower court has no alternative but to carry into effect that direction."

There were "specific directions as to how the court should proceed" in this matter. The court was told to "allow each side to adduce further testimony," but instead of so doing the court exercised an "alternative" and gave "other" and "further relief."

The doctrine as to compliance with the mandate is strongly set forth in Rees *v.* McDaniels, 131 Mo., 681; Gage *v.* Bailey, 119 Illinois, and Choteau *v.* Allen, 114 Mo., 56.

This doctrine is especially true as to a supplemental bill when filed after the mandate. In Mackall *v.* Richards, 116 U. S., 47, Chief Justice Waite takes the position that matters occurring after the mandate was sent down are improperly brought up by supplemental bill. He holds such an introduction improper and suggests that they can only be brought in an original proceeding.

In re Sanford Fork & Tool Co., 160 U. S., 255, Mr. Justice Gray uses this very decisive language: "The Circuit Court is bound by the decree as the law of the case; and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even

for apparent error, or intermeddle with it, further than to settle so much of it as was remanded."

Sibbald *v.* U. S., 12 Pet., 488, 489.

T. & P. R. R. Co. *v.* Anderson, 149 U. S., 237.

The direction to "allow both sides to adduce further testimony" was specific. It provided a method for the return of the case to the Supreme Court. Instead the court "varied it," "intermeddled with it," to the extent that it refused to allow the parties to take further testimony by allowing proceedings asking for "other and further relief," the direct result of which was that the parties could not "adduce further testimony," although that was the express direction of the mandate of the Supreme Court of the United States and the only purpose for which it was sent back.

If there was any ambiguity in the mandate (and clearly there was not), a reference to the opinion of the court would have cleared the whole situation. That opinion in substance refuses to decide the case upon its merits because there is not sufficient "evidence of a material character" and it refers it back to the lower court so that this failure may be remedied and so that "evidence of a material character" can be adduced. It can be plainly seen that the entering of the decree on the supplemental bill utterly destroyed whatever right the parties may have had to take testimony in conformity with the mandate.

It might be contended that the provision of the mandate which provides for "further proceedings," etc., allows the filing of the bill, but such a contention fails utterly when we see that it provides only for such proceedings as are "in conformity with the opinion and decree." Surely it cannot be seriously maintained that the filing of the supplemental bill in the cause was in conformity with the opinion and decree of the Supreme Court of the United States.

The courts go even so far as to suggest a remedy or two in cases where the mandate is not obeyed. In U. S. *v.* Fo-

satt, 62 U. S., 445, and a whole line of cases the court suggests that mandamus may be used to compel obedience, and in the matter of Sanford Fork & Tool Co., 160 U. S., 255, the court says that the question may be raised either by mandamus or on appeal.

If a mandate is not to be strictly obeyed it is not in fact a mandate. The word itself means a command, and if it not to be followed there would be no reason in this or any other court issuing a mandate.

It is therefore contended that the district court erred in allowing the filing of a supplemental bill and entering a decree thereon, because such action was contrary to the express directions of the mandate to allow each side to take further testimony and to have further proceedings IN CONFORMITY WITH THE DECREE AND OPINION.

Under the first five assignments of error it is further contended that the United States had no legal right to file its supplemental bill and that the Supreme Court of the Territory erred in not reversing the decree of the district court because of that court's error in granting the order of April 7, 1903, under which order the United States was permitted to file its supplemental complaint in this cause. Appellants contend that the supplemental bill made up as it was of allegations inconsistent with the allegations of the original and amended bills was nothing more than a mere unauthorized pleading.

The purpose of the original and amended bills was to restrain the defendants below from constructing a dam in the Rio Grande River for the impounding of its waters. Both bills alleged that the Rio Grande was a navigable stream within the Territory of New Mexico and that the contemplated acts of the defendants would obstruct and interfere with such navigability, and that the contemplated acts of the defendants were in violation of the laws of Congress and of the regulations of a public department of the United States Government; and that they were unauthorized and illegal.

An injunction was prayed by the bills and granted by the court. This fact conclusively shows that the purpose of the bills was to attack the defendants' enterprise as illegal—an injunction never being granted to restrain a lawful act.

The purpose of the supplemental bill, on the other hand, was to declare a forfeiture of the defendants' rights upon the ground that they had failed to exercise those rights within the period limited by the act of Congress of March 3, 1891, the defendants having been restrained by injunction from the exercise of any of their functions in carrying on the purposes of their incorporations, and in acting upon the concessions given to one of them by an authorized department of the United States Government.

The purpose, therefore, of the supplemental bill was in no way related to the original and amended bills. Each set up an original, distinct, substantive cause of action, and the supplemental bill in no way depended upon the original bill. On the contrary, it distinctly changed the character of the original and amended bills, related to them in no way, raised new facts which had arisen since the filing of the original and amended bills, which constituted a new and independent cause of action, without reference to the facts alleged in the original and amended bills.

The relief prayed for in the supplemental bill is a forfeiture of the defendants' rights, on the ground that they had not completed the work within the time authorized by law. The relief prayed for in the original and amended bills was an injunction to prevent the defendants from carrying on their enterprise and to prevent them from even inaugurating any work of the character outlined in the respective bills.

The complainant, had the allegations of its amended and original bills been proved, and had such allegations been sustained by the proofs, upon the trials thereof had, would have succeeded in the action, independently of the allegations set forth in the supplemental bill. The complainant would have succeeded by the allegations of forfeiture in the sup-

plemental bill if sustained by the proofs without reference to the allegations of the original and amended bills.

A new, independent cause of action was therefore set forth by the supplemental bill from those made in the original and amended bills.

That such is not permissible is well established by a host of authorities.

"We do not understand that the plaintiff can, either by amendment or by supplemental bill, make an essentially different case, or pray for relief manifestly inconsistent with that claimed in the original bill."

Electric Accumulator Co. *v.* Brush Electric Co., 44 Fed. Rep., 602-607.

"The prayer of a supplemental bill may ask for other and different relief from that demanded in the original bill but the new matter introduced should be such as refers to and supports the case made in the original bill, and the prayer should likewise be in furtherance of that case. An inconsistency between the supplemental bill and the original bill either as regards subject-matter or prayer is fatal."

Street's Fed. Eq. Practice, Vol. 2, Sec. 1170.

"A supplemental bill that sets up facts not at all connected with the case made in the original bill or with the decree under it, is bad."

Street's Fed. Eq. Practice, Vol. 2, Sec. 1171.

"A supplemental bill must not be inconsistent with the original bill."

Foster's Fed. Practice, Vol. 1, 4th Ed., 631.

If the original bill fails to set up a state of facts justifying the relief sought, a supplemental bill, based on facts afterwards occurring, cannot be sustained.

New York Security & Trust Co. *v.* Lincoln St. Ry. Co. *et al.*, 74 Fed., 67.

"The complainants base their right to relief, so far as we are at present advised, upon the theory that the board of transportation is at present proceeding to exercise powers

conferred upon it by the former act, which were withdrawn by implication only, by the later act; and as this question was in no wise raised or considered in the original case in which the supplemental bill has been filed, but is essentially a new question, we have been led to entertain, and we do entertain, grave doubts whether a supplemental bill to settle that question can be lawfully entertained consistently with established rules of procedure in equity."

"A defective bill affording no ground for proceeding cannot be sustained by filing a supplemental bill founded on matters taking place after the filing of the original.

Putney *v.* Whitmire, 66 Fed., 385.

It is not permissible to interject by way of supplemental bill new matter which is wholly foreign to the complainants' original case and inconsistent with the relief prayed for.

Stafford *v.* Howlett, 1 Paige (N. Y., 200).

"And where the facts alleged show a new and substantive cause of action upon which a decree could be had without reference to the original bill, it has been held that it could not be set up by way of supplemental bill because the facts are entirely distinct from the original cause of action, and although they occurred subsequent thereto they constitute another and a new cause of action. And so if the relief sought depends upon such facts, it would be necessary to dismiss the original bill and file a new one."

Vanzile, Eq. Pleading & Practice, Sec. 263.
Milner *v.* Milner, 2 Edw. Ch. (N. Y.), 114.

"It would seem to be more appropriate to litigate a new question of that nature by an original bill, and this is an additional reason which has induced us to approve of the action of the Circuit Court in denying a temporary injunction."

Higginson *et al. v.* Chicago, B. & Q. R. R. Co. *et al.*, 102 Fed., 197-200.

A plaintiff cannot file a supplemental bill to introduce facts which have occurred since the filing of the original bill, and upon which a decree can be had without reference to the original bill. The plaintiff should dismiss the original bill and file an entirely new one.

Milner *v.* Milner, 2 Ed., Ch. 114.

"A supplemental bill which is in irreconcilable conflict with the original bill will be dismissed at the hearing, though filed by leave of court."

Fletcher's Eq. Pleading & Practice, 892.

The supplemental bill must be germane to the original bill.

Minn. Co. *v.* St. Paul Co., 6 Wall. (U. S.), 742.

Where an original bill shows no grounds for relief, it cannot be aided by a supplemental bill setting up matters that have arisen since the filing of the original bill.

Story, Eq. Pleading, Sec. 339.
Hughes *v.* Carue, 135 Ill., 519.
Putney *v.* Whitmire, 66 Fed., 385-388.

A supplemental bill making a case entirely different from and antagonistic to the one presented by the original bill cannot be allowed.

Maynard *v.* Green, 30 Fed., 643.

Plaintiff cannot file a supplemental bill to introduce new facts which have occurred since the filing of the original bill and upon which a decree can be had without reference to the original bill, and in such case, the original bill should be dismissed and a new one filed.

Prouty *v.* Lake Shore & M. S. Ry. Co., 85 N. Y., 275.

In Snead *v.* McCoual *et al.*, 53 U. S., 12 How., 407, the court said:

"After this case had been heard in argument and taken under advisement in the Circuit Court the petitioner petitioned that court to permit him to file a further bill by way of amendment and supplement to the original bill and bill of revivor previously filed in the case and after being heard by counsel upon his petition the court refused to grant the prayer thereof on the grounds that the application was made at too late a period and that the change proposed by the plaintiff in the character of the cause would have been in reality the presenting of an original and new case rather than an amendment to the original bill. This refusal of the Circuit Court was held to be sound in principle and it is

sustained by the express language and authority of this court in the case of Walden *et al. v.* Boadley *et al.*, 14 Pet., 156., which declares that although there are cases where amendments may be permitted at any stage in the proceedings in the cause, as where an essential party has been omitted, yet amendments which change the character of the bill or answer, so as to make substantially a new case should rarely if ever be permitted after the cause is set for hearing much less after it has been heard."

SIXTH AND SEVENTH ASSIGNMENTS OF ERROR.

Under these assignments which are set forth in full at page 104 of the record the plaintiffs in error contend that notice of the application for leave to file the supplemental bill was necessary.

Equity Rule 57, page 110, Desty, Seventh Edition.

The service of the copy of the supplemental bill was not notice of the application, and the said bill not being authorized the defendants were not bound to answer it.

THE EIGHTH TO THE EIGHTEENTH ASSIGNMENTS OF ERROR (BOTH INCLUSIVE).

Under these remaining assignments of error we desire to discuss two propositions, a number of the assignments of error being framed more out of abundant caution as a matter of practice than to raise new questions.

The first of these propositions is that relief should have been granted the defendants upon their motion to be relieved from their default in not pleading to the complainant's supplemental bill. The true situation in this regard and the reasons why these defendant companies should have been relieved from their default can best be seen by referring to the affidavit of Dr. Nathan Boyd, one of the directors of these companies. The part of his affidavit which relates

to this question is to be found on pages 69 and 70 of the printed record, and is as follows:

"Deponent further says that the attorneys and solicitors for defendants in this cause in the District and Territorial Supreme Courts of New Mexico, were as follows: W. A. Hawkins, S. B. Newcombe, and Albert B. Hall, and all of whom as deponent is informed reside in this territory and were the attorneys and solicitors of record in said cause; deponent further says that J. H. McGowan represented the defendants and appellees in both of said appeals before the Supreme Court of the United States; that said McGowan at said time and now resides in the City of Washington, in the District of Columbia; that S. B. Newcombe, one of the solicitors and attorneys of record for defendants, departed this life more than one year since."

"Deponent further says that said W. A. Hawkins and A. B. Fall, the surviving solicitors and attorneys of record for defendants in said cause in the Territory of New Mexico, gave to said defendants no notice whatever of the application to the court by the complainant herein for leave to file its supplemental bill, and that deponent received no notice from said solicitors and attorneys for defendants that an application would be made by said complainant for leave to file said supplemental bill; that deponent represented said defendants in all things pertaining to the aforesaid litigation, and said solicitors and attorneys aforesaid had full knowledge that this deponent was the business representative of said defendants, and that the deponent had the direction and charge of said litigation from its inception, and that said solicitors and attorneys recognized deponent as the official representative of said defendants in all of said litigation from its inception; deponent further says that it appears from the record in this cause that on the 7th day of April, 1903, the complainant herein applied to the third judicial district court to file its supplemental bill herein; that the defendants had no notice of said application and motion so made in behalf of complainants; that after the 7th day of April, 1903, this deponent while at Philadelphia, Pa., received from J. H. McGowan by mail what purported to be a proposed supplemental bill of complaint in behalf of complainant; that as deponent recollects said supplemental bill so received as aforesaid was substantially a copy of the supplemental bill

filed herein April 7, 1903; that said supplemental bill so received by deponent from said McGowan came to him without comment and without any suggestions from said McGowan that said supplemental bill required an answer to be made thereto by said defendant, and this deponent understood from reading said supplemental bill so sent to him by said McGowan aforesaid that the same was merely to be used upon an application by complainant to file same; deponent not understanding that an order for the filing of the said supplemental bill had been made by the court and that the said supplemental bill stood as a pleading in the cause and which required an answer by the said defendants; that this deponent relied upon the prayer for judgment as found upon the 5th page of said supplemental bill, paragraph 5, and which is in the language and figures following, to wit:

"Wherefore plaintiff prayed to be permitted to file this supplemental bill of complaint and that the same be considered upon the hearing of this cause and that the defendants to have forfeited all the rights they may have had or claimed under and by virtue of said act of March 3, 1891, not hereby admitting, however, that the defendants ever acquired any rights under and by virtue of said act."

Deponent further says that he fully believed upon reading said supplemental bill that the application for filing thereof was still undetermined and that the court had not granted said application, and that the court would refuse to grant said application as the said cause had theretofore been heard upon the original pleadings in said cause separate and apart from the new matter and new cause of action alleged and set forth in said supplemental bill.

The only other proposition which we desire to call to the attention of the court under these assignments of error is that the United States is estopped from alleging forfeiture of the plaintiffs' in error francises, rights, etc., because of the failure of the plaintiffs in error to begin work within the time limited by the act of Congress of March 3, 1891.

We contend that the United States is estopped from alleging forfeiture under the act aforesaid because it had en-

joined the defendant companies from inaugurating any of the work required to commence its enterprise.

The question raised by the supplemental bill that the defendants have been restrained by injunction for only a part of the time since the commencement of the action is not properly here. Such a question can only be raised by an independent action and cannot be presented by a supplemental bill. The United States has for six or seven years conducted a litigation the whole purpose of which has been to destroy the enterprise of the defendant companies. This litigation has involved the defendant companies in immense expenditures for costs. During all of these years that this litigation has continued it has been the real cause of preventing the companies from carrying out the purposes of their incorporations. Can the Government now be permitted, and is it not clearly estopped from alleging that the defendants have not completed the work within the time limited by law? We contend that in effect the defendants were at all times under the restraint of the injunction from the inception of the litigation up to the present time. It has been absolutely impossible for the defendants to continue their work while the Government has been exerting all of its energy to prevent such work. Can the United States, then, be allowed to set up a forfeiture of the rights of the defendant companies when it itself is absolutely and directly responsible for their failure to comply with the act? An injunction was procured by the United States, and it is a principle of law too well settled to require argument or the citation of authorities that a party shall not take advantage of his own wrong or be permitted to claim a forfeiture by reason of an act he prevents or the omission of an act he causes. The United States is here precluded from raising against the defendants the question of limitation of time when by its own act the defendants were held up and prevented from carrying out the objects for which they were organized.

Because of the manifest errors in this record, we respectfully submit that the decree of the court below should be reversed and the cause remanded with such directions as to this court may seem just and proper all the premises considered.

Respectfully submitted,

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WILLIAM W. BRIDE,
FREDERICK S. TYLER,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE RIO GRANDE DAM AND IRRIGATION Company and the Rio Grande Irrigation and Land Company, Limited, appellants, *v.* THE UNITED STATES, appellee. } No. 49.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF FOR THE UNITED STATES.

This case now appears for the third time in this court. Its other appearances are reported in 174 U. S., 690, and 184 U. S., 416. The suit presents, as Mr. Justice Harlan said in 184 U. S., on page 417, a controversy "between the United States and the appellee [now appellant] corporations as to the right asserted by the latter to construct over and near the Rio Grande a certain dam and reservoir for the purpose of appropriating the waters of that river in their private business."

The original bill of complaint was filed in the District Court of the Third Judicial District of the

Territory of New Mexico on May 24, 1897 (Rec., 1); an amended bill of complaint was filed on June 21, 1897; and to this bill the Irrigation and Land Company was added as a party, the suit having previously been against the Dam and Irrigation Company only (Rec., 6).

The amended bill alleges among other things that defendants are about to construct dams across the Rio Grande in the Territory of New Mexico; that they intend "to accumulate and impound water from said river in unlimited quantities in said dams and reservoirs" for distribution of the water by an extensive system of ditches and pipes for purposes of irrigation and of general, municipal, domestic, and manufacturing use (Rec., 7); that the Rio Grande is a navigable river, but "receives no addition to its volume of water between the projected dam and the mouth of the Conchos River, about 300 miles below" (Rec. 8); that "the construction of said dam has never been affirmatively authorized by law" (Rec., 8); that the plans and specifications for the construction of the dam have not been submitted to or approved by the Secretary of War; and that "the Government of the United States of America and the Republic of Mexico have by treaty stipulation, agreed and declared that the Rio Grande, from the southern boundary of the Territory of New Mexico to its mouth, shall be free and common to the vessels and citizens of both countries, and that neither country shall without the consent of the other construct any work that may impede or interrupt in whole or in

part, the exercise of said right of free navigation;" and that neither the United States nor Mexico has authorized the construction of the dam (Rec., 9).

The treaties to which the bill refers are set forth in the opinion of this court in 184 U. S., on pages 417, 418.

Defendants filed both a plea and an answer. The plea set up, in response "to so much of said bill as alleges as ground for the relief sought that the proposed construction of the dam and reservoir of defendants at Elephant Butte, N. Mex., has never been affirmatively authorized by law and that such can not lawfully be made until the plans of same have been submitted and approved by the Secretary of War" (Rec., 17); that the site of the proposed dam and reservoir is in New Mexico, within the arid region of the United States (Rec., 17); that the legislation of the United States provides "for the survey and segregation of lands for reservoir sites in the said arid region" (Rec., 18); that the proposed reservoir site of defendants has been surveyed and the land therefor has been "segregated and reserved" (Rec., 18); that on June 18, 1897 (i. e., twenty-five days after the bill in this suit was filed), the Dam and Irrigation Company made an application for its proposed reservoir site (Rec., 18); and the plea then proceeded:

> And for a further plea defendants say that the defendant, the Rio Grande Dam and Irrigation Company, is properly organized and doing business under the laws of the said Ter-

ritory of New Mexico and has complied with all the laws of said Territory in reference to the construction of dams and reservoirs and the diversion of waters of public streams of said Territory, and that having complied with said laws the said defendant is authorized thereunder to construct its dams and reservoirs in the Rio Grande River in said Territory and divert the waters thereof; and the defendants further say that the said Rio Grande Dam and Irrigation Company, having first complied with the local laws, rules and regulations made and filed its articles of incorporation and proof of its organization with the Secretary of the Interior and made its application for its dam and reservoir at Elephant Butte, the construction of which is here sought to be restrained, before the land office of Las Cruces, N. Mex., and that such application and the map and survey of such dam and reservoir have a long time prior hereto and prior to the filing of the bill of complaint herein been approved by the Secretary of the Interior of the United States and are yet so approved and the construction of said dam and reservoir duly authorized under the provisions of an act of Congress of March 3rd, 1891, under which said act application for such right to construct such dam and reservoir was duly made as aforesaid. (Rec., 18–19.)

A temporary injunction against the construction of defendant's dam and reservoir was granted on May 25, 1897, but this injunction was dissolved on July 31, 1897—sixty-seven days after it had been granted—and has never been renewed (Rec., 26).

At the time of dissolving the temporary injunction the bill was dismissed for lack of equity (Rec., 26); on appeal by complainant the Supreme Court of New Mexico affirmed the decree of dismissal; and thereupon the United States appealed to this court, where the decree dismissing the bill was reversed and the case was remanded with instructions "to set aside the decree of dismissal, and to order an inquiry into the question whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability, and if so, to enter a decree restraining those acts to the extent that they will so diminish." (174 U. S., 690; 710.)

Proofs were taken and a further hearing was had. On January 2, 1900, the District Court of New Mexico filed findings of fact (Rec., 29–41), the general result of which was a conclusion by that court that the intended acts of defendants in constructing their dam and reservoirs and in appropriating the waters of the Rio Grande would not substantially diminish the navigability of that river within the limits of its present navigability. The United States then made a motion for rehearing, which was supported by affidavits setting forth that since the trial of the case it had discovered new and material evidence, the substance of which was set forth in the motion (Rec., 41); on January 9, 1900, this motion was overruled and final decree was entered against the United States (Rec., 48, 49). From this decree the United

States appealed again to the Supreme Court of the Territory, but the decree of the trial court was there again affirmed. (Rec., 49.)

Once more the United States came to this court, and once more the decree below was reversed and the case was remanded with directions "to reverse the decree of the District Court and to remand the case with direction to grant leave to both sides to adduce further evidence." (184 U. S., 416, 425.)

While the case was awaiting trial on the general merits, the United States moved for leave to file a supplemental bill, and this motion was granted on April 7, 1903. (Rec., 54.) The bill was filed on the same day, and a copy thereof was served, likewise on the same day, upon A. B. Fall, esq., one of the attorneys of record for defendants. (Rec., 58.) This supplemental bill averred, after reciting among other things the portion of defendants' plea to the amended bill which has been already quoted, that by the act of Congress approved March 3, 1891—under which by their plea defendants had claimed their reservoir site—"it was provided 'that if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch or reservoir, to the extent that the same is not completed at the date of the forfeiture,' and that although five years since the filing and approval of said articles of incorporation, proofs of organization, maps and surveys

have long since elapsed, defendant has not complied with the requirements of said act, but has failed to construct or complete within the period of five years after the location of said canal and reservoir any part or section of the same, and the same has by reason thereof become forfeited." (Rec., 57.)

The prayer of the supplemental bill was "that the defendants be decreed to have forfeited all the rights they may have had, or claimed under and by virtue of said act of March 3, 1891, not hereby admitting, however, that the defendants ever acquired any rights under and by virtue of said act;" and that injunction and other relief prayed in the amended bill be granted. (Rec., 57.)

The motion of the United States for leave to file its supplemental bill was made in open court and during a regular term of court. (Rec., 110, 112.) Beyond this, notice of the motion to file the supplemental bill had been served upon defendants' attorneys, as expressly found by the trial judge. (Rec., 84.) Nevertheless, and though a copy of the supplemental bill had been served upon defendants' attorneys also on April 7, 1903 (Rec., 58), defendants neither demurred nor pleaded in any way to the supplemental bill, nor made any motion to strike the bill off file, nor took any other step whatever concerning the supplemental bill; and thereupon, on May 21, 1903—forty-four days after the supplemental bill had been served—the court took the supplemental bill as confessed, found the failure of

defendants to construct any part of their proposed reservoir or ditches within the five years prescribed by statute, and entered decree adjudging a forfeiture of the rights which defendants asserted by their plea to have been acquired by them under the act of March 3, 1901. (Rec., 59, 60.)

The statute of New Mexico, which required defendants to plead to the supplemental bill within twenty days after its service on defendants' attorneys, reads:

> Every pleading subsequent to the complaint shall be filed and served within twenty days after service of the pleading to which it is an answer, demurrer or reply. (Compiled Laws of New Mexico, 1897; Title XXXIII, Code of Civil Procedure, ch. 1, art. 4, subsec. 46.)

On October 31, 1903—after not a step had been taken and not a word had been said by defendants or their attorneys concerning or in response to the supplemental bill, filed and served on April 7, 1903—a motion was made by new attorneys for defendants that the order of April 7, 1903, allowing the supplemental bill to be filed be vacated and set aside; that "said defendants' default upon said motion of plaintiff to file said supplemental bill of complaint be relieved and opened, and said defendants be permitted in this court, after the opening of said default, to oppose and resist the granting of said motion" (Rec., 65); that the decree entered "upon defendants'

default in answering said supplemental bill of complaint be vacated" (Rec., 65), and that "the defendants herein, should this court not determine to relieve said defendants from their default upon said motion of plaintiff to file said supplemental bill of complaint, be permitted to come in and answer said supplemental bill of complaint." (Rec., 65.)

This motion was accompanied by affidavits of Nathan E. Boyd, a director of defendant companies (Rec., 66–73), and by a proposed answer to the supplemental bill, which defendants sought permission to interpose (Rec., 74–82). No affidavit on the part of any of defendants' attorneys was filed in support of the motion of October 31, 1903, either to refute their having had notice of the application for leave to file the supplemental bill, or to deny the service of the supplemental bill upon them as soon as filed, or to explain in any way their total inaction after the filing of the supplemental bill, from April 7 to October 31, 1903. Further, the proposed answer served with the motion admits the total failure of defendants at any time to construct their dam, reservoir, and irrigation works; it being expressly averred, with reference to the temporary injunction granted on May 25, 1897, and dissolved on July 31, 1897, "that had said injunction been refused and not granted, and had said action not been instituted by the complainant and all of which said proceedings having for their object the annihilation and destruction of the defendant's enterprise, the said defendant

would have had completed the said irrigation works and would have had the same in successful operation to the great benefit and advantage of a large district of country in New Mexico," etc. (Rec., 80, 81.)

Defendants' stated motion was denied. (Rec., 83, 84.) They appealed to the Supreme Court of New Mexico, but their prayer was for an appeal "from the final decision and decree entered in the case" (Rec., 84, 85), and the appeal was allowed "from the judgment and decree" of the District Court (Rec., 85). No appeal was asked or allowed from the order denying defendants' motion of October 31, 1903, though that order was entered months after the decree in the case, and indeed after expiration of the term at which the decree was entered.

The Supreme Court of the Territory affirmed the judgment below (Rec., 99, 100), whereupon the present appeal was taken to this court from the judgment of the Supreme Court of the Territory (Rec., 107).

The numerous errors assigned by appellants relate to three subjects: (1) The propriety of allowing the supplemental bill to be filed, (2) the entry of decree against appellants for their failure to plead to the supplemental bill, and (3) the refusal of appellants' motion to vacate the order allowing the supplemental bill to be filed and the decree entered upon their failure to plead to that supplemental bill and to open appellants' default and allow them to plead to the supplemental bill.

ARGUMENT.

I.

The proceedings had in this case since decision of the second appeal to this court (184 U. S., 416) are in no way inconsistent with this court's mandate.

This court remanded the case "with directions to reverse the decree of the District Court and to remand the cause to that court with directions to grant leave to both sides to adduce further evidence." (Rec., 95.) At this stage of the case it was entirely permissible to amend the pleadings or to alter them otherwise.

Marine Ins. Co. v. *Hodgson*, 6 Cr., 206.
Neale v. *Neales*, 9 Wall., 1.
Ex parte French, 91 U. S., 423.
Hinckley v. *Morton*, 103 U. S., 764.
Mason v. *Pewabic Co.*, 153 U. S., 361.
In re Sanford Fork & Tool Co., 160 U. S., 247.

In the last case it was said:

> But the Circuit Court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. (Citing authorities.) The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate; and, either upon an application for a writ of mandamus or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly. * * * The case being thus left open, by the opinion and mandate of this court, and by the general rules of practice in equity, for further proceed-

> ings, with a right in the plaintiffs to file a replication, putting the cause at issue, the Circuit Court might, in its discretion, allow amendments of the pleadings for the purpose of more fully or clearly presenting the facts at issue between the parties (pp. 256 and 259).

Nothing in the previous decisions of this court was incompatible with the filing of the supplemental bill or with the subsequent proceedings upon that bill. The trial court upon return of the case to it had full possession of the case for all proceedings not contravening this court's orders, as much as if the case had never come to this court.

II.

Appellants are not in position to urge any fault in the action of the District Court, unless it be in that court's denial of their motion of October 31, 1903, for vacation of the order allowing the supplemental bill to be filed, or for permission to plead to the supplemental bill.

This follows because until their motion of October 31, 1903, appellants, with immediate knowledge of the filing of the supplemental bill through service of a copy of that bill on their attorneys on the very day when it was filed, never objected in any way to the filing of the bill or pleaded in any way to the bill or took any step of whatsoever kind to oppose the proceedings which were had.

1. Even assuming for argument that the supplemental bill could not properly have been filed, the order of the District Court allowing it to be filed was not void; the actual filing of the bill and service of a

copy of it upon appellants' attorneys were not void. These acts, therefore, of the court and of complainant in the case called upon defendants to do something if they wished to question the propriety of the filing of the supplemental bill. Their remedy was a motion to vacate the court's order allowing the bill to be filed, and that motion was not made until more than five months after actual entry of decree taking the bill as confessed; or appellants, instead of or in addition to the motion to vacate the filing of the bill, could demur to it or could take exception to it by plea or answer if they thought the bill not to be truly supplemental. They made no objection whatever until their motion of October, and therefore they must succeed or fail here under the test whether there was error in denying the motion of October 31, 1903, at the time and under the circumstances of that motion.

Suppose, for example, that appellants had not even made their motion of October. Obviously, then, they could not complain at all of the action below; because by never objecting to the court's proceedings, they would have acquiesced in them. In the same way, appellants can not now allege any error on the part of the trial court unless it wrongly overruled defendants' only attack upon its acts, viz, the motion of October. The inquiry here will therefore be whether at the time and under the circumstances of the October motion the trial court erred in denying the motion.

Allowance of the filing of a supplemental bill is within the fair discretion of the trial court.

Berliner Gramaphone Co. v. *Seaman,* 113 Fed., 750, 754.

Jacob v. *Lorenz,* 98 Cal., 332, 337.

Farmers' Loan & Trust Co. v. *Bankers & Merchants Telegraph Co.,* 109 N. Y., 342.

And, in general, granting or refusing leave to file a new plea, or to amend a pleading, is discretionary, and is not reviewable on appeal except for gross abuse of discretion.

Mandeville v. *Wilson,* 5 Cranch, 15, 17.

Gormley v. *Bunyan,* 138 U. S., 623.

Chapman v. *Barney,* 129 U. S., 677.

Walden v. *Craig,* 9 Wheat., 576.

Chirac v. *Reinicker,* 11 Wheat., 280.

Ex parte Bradstreet, 7 Pet., 634.

Is discretionary judicial action to be interfered with unless it is assailed by the parties claiming to be prejudiced by it? If not, this appeal must stand or fall as the trial court was right or wrong in denying the motion of appellants to vacate its proceedings, which was made after they had failed seasonably to attack or to answer the supplemental bill, and after they had remained passive for five months after entry of decree.

2. Defendants never took exception to the order allowing the supplemental bill to be filed. They could not except because they did not object. Their only exception was to the denial of the October motion. (Rec., 87.)

3. Appellants of course can not make separate or independent complaint of the trial court's treating its own act of allowing supplemental bill to be filed as operative until revoked (upon proper attack by appellants); and appellants accordingly can not now assail the court's action in taking the supplemental bill pro confesso and entering decree upon that bill for their failure to plead. Their right to object to these proceedings must depend upon their right to assail their foundation; i. e., the allowance of the filing of the bill. So we get back to the sole question, already stated, whether when and as appellants first asked it of the court, viz, by their motion of October 31, 1903, appellants were entitled to have the supplemental bill taken off file.

Before going to the question of the ruling on defendants' motion of October, however, I shall first assume, for the sake of argument, that defendants may attack the allowance of the filing of the supplemental bill and the entry of decree upon that bill as confessed, without reference to the time and circumstances of their October motion; and so I shall argue at once that the supplemental bill was properly filed and was properly taken as confessed, for failure of appellants to plead to it.

III.

It was proper to allow complainant's supplemental bill to be filed.

This question has two branches: First, concerning the claim that the order allowing the bill to be filed was made without notice to defendants' attorneys,

and, second, concerning the claim that the bill is not really supplemental.

The matter of notice has three answers.

1. Notice was actually given to defendants' attorneys. So the trial judge expressly found. The order denying the October motion that defendants' default be opened says that the court "doth find that the motion for leave to file said supplemental bill of complaint was served upon the attorneys of record of the said defendants and that there was no irregularity in the filing of said supplemental bill of complaint." (Rec., 84.)

Nor is there any evidence in the record to the contrary. No affidavit was presented from any of defendants' attorneys on any subject in connection with the motion for opening of defendants' default. The affidavit of Boyd (Rec., 66–73) does not deny notice to the attorneys. Further than this, the very form of the October motion confesses the accuracy of the court's finding that notice was given, for that motion prayed "that said defendants' default upon said motion of plaintiff to file said supplemental bill of complaint be relieved and opened." (Rec., 65.)

2. Notice of an application for leave to file a supplemental bill is not in all cases necessary. It is a matter of discretion with the court whether to require such notice.

Chancellor Walworth said:

> Although a party may not file a supplemental bill without permission of the court, leave is usually granted on an ex parte application. If there is probable cause for filing

> it, the leave will be granted of course, and the court only examines the question so far as to see that the privilege is not abused for the purposes of delay and vexation to the defendant. And, in a case of doubt, the court may direct notice of the application to be given to the defendants who have appeared.
>
> *Eager* v. *Price*, 2 Paige Ch., 333, 335.

In a later case he said:

> The defendant's solicitor was under a mistake in supposing he was entitled to notice of the application for leave to file the supplemental bill. Such notice is only necessary where the complainant wishes to obtain a preliminary injunction, or some other special relief founded on the supplemental bill, previous to the time for the appearance of the defendants in the supplemental suit. In general, the leave to file such a bill is obtained upon an ex parte application. And if it is filed without any sufficient grounds, the defendants must make the objection by plea, answer or demurrer.
>
> *Lawrence* v. *Bolton*, 3 Paige, 294, 295.

To like effect:

> *Barriclo* v. *Trenton Mutual Life & Fire Ins. Co.*, 13 N. J. Eq., 154, 155.
>
> *Winn & Ross* v. *Albert et al.*, 2 Md. Ch., 42.
>
> *Taylor* v. *Taylor*, 1 Mac. & G., 397.

Equity Rule 57 of course does not apply to a case in the territorial court, whose procedure is regulated in the main by the New Mexico Code of Civil Procedure.

The Supreme Court of New Mexico also decided that subsection 104 of the New Mexico Code of Civil Procedure, as amended by chapter 11 of the laws of 1901, made notice of the application unnecessary. The opinion of that court says:

> As to the first objection, it would seem to be a sufficient answer that at the time the court granted appellee leave to file the supplemental complaint the court was in session during a regular term. It was not a vacation order, therefore, but one made in open court.
>
> This is a matter of practice and governed by the Code of Civil Procedure. Subsection 104 of the code as amended by chapter 11, laws of 1901, provides that—
>
> "Any hearing of any kind, whether interlocutory or final, unless trial by jury is necessary, may be had in any case out of regular term time upon five days' notice, in writing to the opposite party, or his attorney or solicitor, but the court or judge may, upon application, for good cause shown, extend the time of hearing. Such hearing may be had during the term of court at any time in the discretion of the court."
>
> Counsel for appellants insists that it was error for the court to allow the filing of the supplemental complaint without notice. The section above referred to provides for notice of five days for hearings in vacation, but there is no such requirement as to hearings in open court during a regular term. The record discloses that this cause had been pending in the court for almost one year, awaiting further proceedings, and Mr. Boyd in his affidavit

admits Mr. A. B. Fall and Mr. W. A. Hawkins were attorneys of record for appellants at the time the supplemental complaint was filed. The record further shows that the supplemental complaint was served upon Mr. Fall on the same day it was filed, April 7, 1903. Attorneys of record are presumed to be present during terms of court wherein their causes are pending, and in contemplation of law chargeable with notice of all proceedings transpiring in open court in causes wherein they are such attorneys. There being no requirement for five days' notice, under the facts of this case, counsel are presumed to have been present and to have such notice as the law requires of matters transpiring in open court on the day on which leave was granted to file the supplemental complaint, and the same was filed and served upon them.

The court was vested with discretion by the last clause of sec. 104, *supra*, which does not seem to have been abused. (Rec., 112–113.)

3. Further, as a copy of the bill was at once served on defendants' attorneys, the omission of notice would not be material error; because defendants had full opportunity thereupon to attack the filing of the bill by motion to vacate the allowance of the filing or by demurrer to the bill, or by both proceedings. The only important thing is that defendants should have been given, as they were given, full and unhampered opportunity for objecting to the filing or to the character of the bill. The failure of defendants to use their opportunity does not show that it did not exist.

The only reason for requiring leave of court at all for the filing of the supplemental bill is to prevent delays and vexatious proceedings.

> *Buckingham* v. *Corning*, 29 N. J. Eq., 238, 240.
>
> *Eager* v. *Price*, 2 Paige, 333, 335.

Failure to give notice of application for leave can not be fatal error, therefore, when the bill is at once served on defendant and he has full opportunity at once to move to strike it off file or to demur.

Subsection 85 of the Code of Civil Procedure of New Mexico provides that:

> The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.

With reference to the claim that the bill is not truly supplemental in character, it is submitted:

1. The point was waived by defendants through their failure to demur to the bill or to plead or object to it in any way within the time allowed them for pleading.

The proper method of objecting to a supplemental bill on the ground that it does not contain supplemental matter is by demurrer.

> 2 Daniell Ch. Pl. & Pr. (6th Am. Ed.), p. *1535.
>
> *Bowyer* v. *Bright*, 13 Price, 316.
>
> *Stafford* v. *Howlett*, 1 Paige Ch., 200.

It has already been quoted from Chancellor Walworth that if the bill "is filed without any sufficient grounds, the defendants must make the objection by plea, answer, or demurrer." (3 Paige Ch., 294, 295.)

It would be intolerable to allow defendants wholly to neglect their regular opportunity by timely pleading to object to the character or sufficiency of the supplemental bill, and then more than six months after the bill was served (i. e., from April 7 to October 31), and more than five months after decree was entered upon their default (i. e., from May 25 to October 31), to make objection for the first time.

2. There is of course nothing in the claim that the supplemental bill is objectionable because it sets forth matter occurring after the suit was begun. Such is the chief, though not the sole, office of a supplemental bill; and, indeed, matter occurring after commencement of the suit can not be introduced into the original bill by amendment, but must be set forth by supplemental bill.

> Story Eq. Pl. (10th ed.), sec. 332.
>
> 2 Daniell Ch. Pr. (6th Am. ed.), p. *1515 (note 1).

3. This supplemental bill does not set up matter foreign to the original case. As stated by the Supreme Court of New Mexico, "the purpose of this entire litigation has been to restrain appellants from constructing the dams, reservoirs, canals, ditches, etc., for the diversion of the waters of the Rio Grande and the obstruction of the alleged navigable portion of said river." (Rec., 116.) It could not be claimed

in the original bill that defendants' rights in their dam and reservoir sites had lapsed, because that was not yet true; but it was claimed in the original bill that the construction of the dam and reservoir had not been authorized by law (Rec., 8), that the construction and use of the dam and reservoir should be stopped because they would violate the rights of the public and the treaty obligations of this country with Mexico; and the entire object of the suit was an injunction against construction of the dam and reservoir. Beyond this, defendants by their plea (quoted on p. 3, *ante*) expressly set up their acquisition of the dam and reservoir sites under the act of March 3, 1891, and presented such acquisition of the sites as a defense to the case. Had the forfeiture of these sites already occurred, it would have been proper for complainant at once upon the interposition of this plea to amend its bill by averring the forfeiture, and so to respond directly to defendants' plea. That was not possible at the time, but it became possible in the course of the litigation to do the same thing—not by amending the bill, because amendment can not embrace matter occurring after initiation of the suit, but by supplemental bill. Could defendants be allowed to utilize their plea as a defense in this case after the rights which they set up in that plea had become subject to forfeiture? Can matter directly responding to the defense actually interposed be deemed foreign to the case? Can a bill which sets up such matter be refused supplemental character?

There can be no doubt of the propriety of complainants having added the claim of forfeiture to their original bill, if the cause of forfeiture had existed when that bill was filed. It must be equally proper to add the claim of forfeiture to the original bill when the cause of forfeiture occurred after suit was begun. This test, that matter may be introduced by supplemental bill which could have been added to the original bill if then available, has been recognized in several cases. Chancellor Johnson of Maryland said:

> The chancellor thinks that if these complainants, Winn and Ross, had been the permanent trustees of Jones at the time their original bill was filed they might have presented their title as such trustees in the same bill with their title under the conveyance by Jones to them of the 26th of October last, which constituted their only title at the time, without subjecting their bill to the objection of multifariousness. And if he is right in this opinion, it would seem to follow that there can be no irregularity in bringing forward the subsequently acquired title in a supplemental bill. That such blending of distinct titles in the same bill, when the matters are homogeneous in their character, is allowable, is stated in 1 Daniell Ch. Pr., 395.
>
> *Winn & Ross* v. *Albert et al.*, 2 Md. Ch., 42, 48.

In *Hardin* v. *Boyd* (113 U. S., 756) it was said:

> Under the liberal rules of chancery practice which now obtain, there is no sound reason why the original bill in this case might not have

> been framed with a prayer for the cancellation of the contract upon the ground of fraud, and an accounting between the parties, and, in the alternative, for a decree which, without disturbing the contract, would give a lien on the lands for unpaid purchase money. The matters in question arose out of one transaction, and were so directly connected with each other, that they could well have been incorporated in one suit involving the determination of the rights of the parties with respect to the lands. The amendment had no other effect than to make the bill read just as it might have been originally prepared consistently with the established rules of equity practice (p. 763).

Illustrations of the scope allowable to a supplemental bill will be found in—

> *Jones* v. *Jones*, 3 Atk., 110.
> *Eager* v. *Price*, 2 Paige, 333.
> *Saunders* v. *Frost*, 5 Pick., 275.
> *Fisher* v. *Holden*, 84 Mich., 494.
> *Jacob* v. *Lorenz*, 98 Cal., 332.
> *Hasbrouck* v. *Shuster*, 4 Barb., 285.
> *Candler* v. *Pettit*, 1 Paige Ch., 168.
> *Winn & Ross* v. *Albert et al.*, 2 Md. Ch., 42.
> *Mutter* v. *Chauvel*, 5 Russ., 42.
> *Reeve* v. *North Carolina Land & Timber Co.*, 141 Fed., 821.
> *Jenkins* v. *Int. Nat. Bank*, 127 U. S., 484.

In *Jones* v. *Jones* (3 Atk., 110) Lord Hardwicke held it proper when the original bill sought to set aside a lease for forgery but did not charge other fraud, to allow a supplemental bill to add a new

charge of separate fraud as a ground for cancelling the lease.

In *Eager* v. *Price* (2 Paige Ch., 333), where the suit was by a creditor to reach certain property of defendant, it was held proper by supplemental bill to pursue subsequently acquired property.

In *Saunders* v. *Frost* (5 Pick., 275) it was held that a bill to redeem from a mortgage could be supported by a new tender, made after the suit was begun, and set up by supplemental bill.

In *Fisher* v. *Holden* (84 Mich., 494), where the bill was for accounting and redemption from a mortgage, a supplemental bill was allowed for the purpose of averring subsequent discharge of the mortgage through an alleged accord and satisfaction.

In *Jacob* v. *Lorenz* (98 Cal., 332) the bill was for an injunction against interference with complainant's ditch. Pending the litigation defendant destroyed the ditch. Supplemental bill was held proper for introducing a claim for damages through this destruction.

In *Hasbrouck* v. *Shuster* (4 Barb., 285) the bill was by legatees for collection of legacies charged upon real estate devised to defendants. Pending the litigation an agreement was made between complainants and defendants which would warrant a decree against defendants personally, rather than merely against the land. Supplemental bill was held proper.

In *Candler* v. *Pettit* (1 Paige Ch., 168) the bill averred pendency of a suit at law by complainant

against defendant, and prayed an injunction against defendant's disposition of his assets. An injunction was denied by the chancellor on the ground that complainant had not yet reduced his debt to judgment and had execution issued and returned unsatisfied. Later, complainant got judgment for his debt and execution was issued and returned unsatisfied. Those facts were introduced by supplemental bill, and an injunction was granted.

The character of *Winn & Ross* v. *Albert* is shown by the quotation already made from it.

In *Reeve* v. *North Carolina Land & Timber Co.* (141 Fed., 821) the sheriff's deed held by complainants at the time of bringing suit was invalid. Pending the suit a new and valid sheriff's deed was procured. It was held allowable to get the benefit of that deed by supplemental bill.

In *Jenkins* v. *International Bank of Chicago* (127 U. S., 484) the suit was to procure a sale of securities pledged as collateral for debts to complainant. Pending the progress of the suit a decree was rendered in another case between the parties, adjudging the amount of the debts. This decree was allowed to be set up by supplemental bill. Mr. Justice Matthews said of the decree:

> It was strictly new matter arising after the filing of the bill, properly set up by way of supplemental bill, in support of the relief originally prayed for. It can in no sense be considered as a new cause of action (p. 489).

Suppose that complainant sought to enforce the forfeiture against defendants in a new and separate suit,

without introducing it into the present case by supplemental bill. Defendants' plea of their rights under the act of March 3, 1891, would then not be answered in this case, and the value of that defense would not be lessened by the claim of forfeiture in another suit. This case might reach decree before the suit for forfeiture, and then defendants would have been allowed to use the defense of which complainant has a right to deprive them. Nor can it be suggested that in the new chancery suit for forfeiture a temporary injunction might issue restraining prosecution of the present case. That, in the first place, would be stopping complainant because of the character of the plea introduced by defendants, instead of stopping defendants from prosecuting their defense; and, in the second place, it would be enjoining in one chancery suit prosecution of another chancery suit; and, in the third place, such temporary injunction against prosecution of the present case would rest on a ground which justifies the claim of forfeiture in the present case, viz, that complainant should be permitted to have the benefit of its claim of forfeiture against the defense under the act of March 3, 1891, which defendants have interposed in this case. Why, then, should not the ground of forfeiture be used directly in the present case in answer to defendants' plea?

The Supreme Court of New Mexico said on this subject:

> The plea of the appellants, above referred to, relies on the act of Congress of March 3, 1891,

> as the basis of all rights claimed by appellants. The forfeiture sought by the supplemental complaint is provided for in the same act. The supplemental complaint, therefore, is directly responsive to this defense and clearly grows out of the same transaction or subject-matter of the litigation. (Rec., 116.)

The rule that a bad title set up in the original bill can not be aided by supplemental bill setting up a new and distinct title has no application to this case. Complainant here is not introducing a new title of its own, but is attacking a title which defendants interpose as their defense. The plea which defendants filed not only legitimates but necessitates complainant's response to it by the claim of forfeiture. Moreover, the stated rule obtains only when complainant's original title is wholly bad and his case is entirely defective; it does not prevent the assertion of a new title by supplemental bill when the new title adds to or supplements the first title, instead of contradicting it. This is the true rule, and is well established in America. Chancellor Johnson, of Maryland, after reviewing the matter in *Winn and Ross* v. *Albert* (*supra*), said:

> It would seem, therefore, that the true rule is, not that you may not by a supplemental bill set up a new title, or new interest acquired since the filing of the original bill, but that a confessedly bad title, relied upon in an original bill, shall not be supported by a good title subsequently acquired, and which is introduced by way of supplement (p. 48).

A new title acquired by plaintiff, when his original title was wholly bad, is inconsistent, too, with complainant's first title; and that fact explains many of the cases. Indeed, it explains *Tonkin* v. *Lethbridge* (Coop. 43), which is the starting point of the rule about titles, and in which complainant first proceeded as heir at law of a mortgagor for redemption from the mortgage and, not being the heir at all, purchased the true heir's right pending the suit and sought to redeem upon the basis of his new title.

This subject of introducing new titles by supplemental bill is thoroughly treated in

Jaques v. *Hall, et al.*, 3 Gray, 194.

See review of cases on pages 197–199. The conclusion reached is that "it is where the right to maintain the original bill wholly fails, that no supplemental bill as to new matter can be filed" (p. 198).

The rule is given this same limitation in

Candler v. *Pettit*, 1 Paige, 168.
Edgar v. *Clevenger*, 3 N. J. Eq., 258.
Lowry v. *Harris*, 12 Minn., 255, 266.
Reeve v. *North Carolina Land & Timber Co.*, 141 Fed., 821, 834.

Suppose, finally, that defendant companies were themselves suing the United States for some cause, and in that suit were standing upon their alleged rights under the act of March 3, 1891, could not the United States assert the forfeiture of those rights by cross-bill? And, if so, why can not the United States as well assert the forfeiture when defendants aver the same rights defensively?

4. There is no inconsistency between the supplemental and original bills in this case. Their purposes, instead of being discordant, were identical, viz, to restrain defendants' construction and use of the proposed dam and reservoir. And the grounds of the two bills in no way conflict. Complainant claimed in the original bill both that defendants had no right to build their dam and reservoir and that their construction and use would destroy the navigability of the Rio Grande. Complainant did not itself assert that defendants had rights under the act of March 3, 1891. Indeed, under the allegation of the original bill that defendants were proceeding without authorization of their project by law it would have been competent for complainant to show that defendants had never gotten any rights under the act of March 3, 1891. Defendants themselves made the assertion, by their plea, that they had acquired the reservoir and dam sites. Complainant by its supplemental bill replied that defendants had not the right to keep those sites or to use them. This is not in contradiction, but in support, of the original claim that defendants could not lawfully build or use the dam and reservoir.

5. The New Mexico Code of Civil Procedure provides:

> A party may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the cause, or praying for any other or different relief, order or judgment.

Compiled Laws of New Mexico (1897), sec. 2685, subsection 87.

Mr. Justice Harlan said in *Hardin* v. *Boyd* (113 U. S., 756):

> In reference to amendments of equity pleadings the courts have found it impracticable to lay down a rule that would govern all cases. Their allowance must, at every stage of the cause, rest in the discretion of the court; and that discretion must depend largely on the special circumstances of each case. It may be said, generally, that in passing upon applications to amend, the ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice (p. 761).

This language is not less but more pertinent to the allowance of supplemental pleadings, because those pleadings are for the averment of facts occurring since the litigation began and which it was no fault of the pleader to omit at the outset.

IV.

As the supplemental bill was on file with the court's consent and defendants' attorneys had at once been served with a copy of it, and they took no step in any way to attack its filing, and failed from April 7 to May 21 to demur or plead in any way to the supplemental bill, it was the right and the duty of the trial court under the New Mexico Code of Civil Procedure, section 2685, Subsec. 46, thereupon to take the bill pro confesso and to enter the decree.

The facts are quite undisputed. The order allowing supplemental bill to be filed had been made in open court during a regular term. (Rec., 112.) A copy of the supplemental bill was served on de-

fendants' attorneys on the very day when it was filed, April 7, 1903. (Rec., 58.) If defendants' attorneys could have desired to know anything more of the situation, it was their duty to consult the files and records in the court. But it is even true, as already shown, that defendants' attorneys had been served with notice of the application for leave to file the supplemental bill. No affidavit was presented in connection with defendants' motion to open their default from any of the attorneys for defendants, and there is not a word in the record from any of those attorneys in explanation or excuse of their complete inattention to the supplemental bill that was served upon them. Nor is any explanation or excuse offered from any other quarter.

Director Boyd, of the defendant companies, says in his affidavit, offered on the motion to open the default, "that the defendants had no notice of said application and motion so made in behalf of complainant" (Rec., 69); but he does not say, and he evidently does not mean to say, that defendants' attorneys had no notice, and his statement that defendants had no notice is explicable solely by that later part of his affidavit in which he attempts to announce the law and declares that "all notices in anywise relating to said motion for leave to file said supplemental bill of complaint should have been made to this deponent by the local solicitors and attorneys, as they well knew that this deponent advised and directed in all things in said action of said defendants and in their behalf" (Rec., 70). This will not do. It is jug-

gling with the facts. Further, no pretense is made even by Boyd that the supplemental bill was not served on defendants' attorneys on April 7, 1903; and that is the important fact with reference to the propriety of their being defaulted forty-four days later. Boyd indeed admits that he himself got a copy of the supplemental bill from defendants' attorneys "after the 7th day of April, 1903" (Rec., 69); but Boyd, with continuing casuistry, does not say how soon after April 7, 1903, he got it. Nor is it important.

In this situation there is no doubt of the law.

1. No subpœna was necessary to require defendants to plead to the supplemental bill.

Shaw v. *Bill*, 95 U. S., 10.

2. The statute of New Mexico required defendants to plead within twenty days. It reads: "Every pleading subsequent to the complaint shall be filed and served within twenty days after service of the pleading to which it is an answer, demurrer or reply."

Code of Civil Procedure, section 2685, subsection 46.

Instead of taking defendants' default on April 28, however, complainant waited until May 21, 1903, giving them forty-four days' opportunity instead of twenty.

3. As already argued, the supplemental bill has been properly allowed to be filed; but even if it had been improperly filed, the act of the court in allowing it was not void, but was only voidable on proper attack. No attack was made by defendants during

the forty-four days between the filing of the bill and service of a copy of it upon defendants' attorneys and entry of decree.

What was the court to do under these circumstances? Not a word nor an act from defendants' attorneys, either to object to the filing of the bill or to respond to it. The court's act stood, and was unassailed. The statute put defendants in default. A decree was the inevitable and proper result.

V.

Even if the supplemental bill had been improperly allowed to be filed, it was right to deny defendants' motion of October 31, 1903, to vacate the allowance of the filing of the bill and the decree that had been entered or to open defendants' default and permit them to plead.

Defendants' inaction and laches deprived them of any claim to relief. Their motion was too late under the New Mexico statute. The supplemental character of complainant's bill was not questionable by motion, but only by demurrer. And, finally, the answer which defendants asked leave to interpose failed itself to show any defense against default.

The four grounds of this point enumerated above will be considered in order.

1. As already shown, no excuse whatever was offered for the delay until October 31 of all objection to the filing of the supplemental bill or of all effort to plead. No reason of any kind is given why defendants' attorneys sat still. Excuses can not be imagined for appellants' benefit.

If defendants wished to question the rightful filing of the supplemental bill because of the alleged lack of notice to their attorneys of the application for leave to file it, they should have moved promptly after the supplemental bill had been served on the attorneys. Under the statute, they had twenty days in which to plead. By analogy, a motion to vacate the filing and thereby to avoid the necessity of pleading should have been made within twenty days. In addition to the analogy, a motion to attack the filing of the bill ought to have been made before it was time for the court, in the absence of defensive pleading, to act upon the bill and to enter a decree. The rights of the court called for that degree of promptitude no less than did the rights of complainant.

If defendants wished to question the supplemental character of the bill, their remedy was a demurrer; and the statute expressly limited the time for demurring to twenty days. Complainant waited, however, forty-four days before entering decree, more than doubling defendants' statutory opportunity. The passage of the statutory time for pleading, without action by defendants, itself wrought a waiver of the right to question the supplemental character of complainant's bill.

If defendants had answered the bill, instead of demurring, they would have waived all objection to the supplemental character of the bill. Ought they to have longer chance for such objection because they did not plead at all?

Objections to a supplemental bill are waived if not taken before hearing.

Fulton Bank v. *N. Y. & Sharon Canal Co.*, 4 Paige, 127.

Underhill v. *Van Cortlandt*, 2 Johns. Ch., 339, 369.

They are likewise waived if not taken before reference to a master.

Pingree v. *Coffin*, 12 Gray, 288.

And objections to the supplemental bill can not be first made in the form of objections to evidence.

Pinch v. *Anthony*, 10 Allen, 470.

Lowry v. *Harris*, 12 Minn., 255, 267.

The Supreme Court of Minnesota said:

> Even if the original bill was wholly defective, and the supplemental bill set up a title vesting in the plaintiffs subsequent to the commencement of the action, objection thereto on that ground must be taken by demurrer to the supplemental bill, or objection to its being filed; otherwise it is waived. Having answered the supplemental bill without objection, and not having demurred, it is too late to take advantage of it on the trial by objecting to the evidence (p. 267).

Beyond all these things it is still to be remembered that defendants' attorneys did nothing for six months after their time to plead to the supplemental bill had passed, and for five months after decree had actually been entered.

The negligence of attorneys is chargeable to their clients. Otherwise there could hardly be such a thing as fault or laches in the conduct of a lawsuit.

Putnam v. *Day*, 22 Wall., 60.

Terry v. *Commercial Bank*, 92 U. S., 454.

If defendants could move under the circumstances of this case, on October 31, 1903, for a vacation of the filing of the bill, of their default and of the entry of the decree, and if defendants then could ask leave to make the objections or interpose the plea which they should have presented six months before, they could as well have waited six years before moving.

2. Mr. Boyd admits in his affidavit that he had actual notice on October 19, 1903, of the entry of the decree. Of this fact the Supreme Court of New Mexico says:

> More than ten days having elapsed after this notice before this motion was filed and long after the decree was rendered, it could not be entertained under subsec. 134 of the Code which provides that a motion to set aside judgment rendered out of term time will not be entertained unless the same is filed and a copy served upon the opposite party within ten days after such finding or judgment was rendered. The motion, therefore, must be made under subsec. 137 of the Code, which provides that "a judgment may be set aside for irregularity, on motion filed at any time within one year after the rendition thereof." As has been pointed out, there was no irregularity in the rendition of this judgment. (Rec., 118.)

The court below therefore held the motion of October 31 too late under subsection 134 of the code,

without reference to the long and unexcused laches of defendants and their attorneys.

3. The question whether the supplemental bill was other than supplemental in character could not be raised by motion. Demurrer was the only proper method of making that point.

> 2 Daniell Ch. Pl. & Pr. (6th Am. ed.), p. *1535.
>
> *Bowyer* v. *Bright*, 13 Price, 316.
>
> *Stafford* v. *Howlett*, 1 Paige Ch., 200.

It is said in Daniells' Chancery Pleading & Practice (*supra*) that "a motion will not lie to take a supplemental bill off the file for irregularity, on the ground that it does not state supplemental matter. The proper course in such case is to demur."

It follows, too, that by not demurring defendants waived the point.

4. The answer which by their motion defendants asked leave to make, in response to the supplemental bill, shows no defense against that bill.

This proposed answer admits defendants' failure to construct their works within the statutory five-year period, as charged in the supplemental bill. Defendants say that—

> Since the commencement of said action and since the granting of said injunction and which injunction was duly served upon defendant, the Rio Grande Dam and Irrigation Company, said defendant has been under the penalty of the said injunction and has been enjoined and restrained by the same from prosecuting its said work, and in consequence of said action of complainant and of said injunction said

> defendants suspended said work and were prevented and hindered from continuing the same; that had said injunction been refused and not granted and had said action not been instituted by the complainant, and all of which said proceedings having for their object the annihilation and destruction of the defendant's enterprise, the said defendant would have had completed the said irrigation works and would have had the same in successful operation. (Rec., 80, 81.)

Instead of disputing their failure, defendants therefore attempt to justify it because of the granting of the interlocutory injunction and perhaps also because of the pendency of this suit. Neither excuse amounts to anything. The interlocutory injunction granted May 25, 1897, was dissolved July 31, 1897. (Rec., 26.) It was in force therefore just 67 days; and it was dissolved five years and eight months before April 7, 1903, when the supplemental bill was filed.

Nor did the pendency of this suit relieve defendants from constructing their works as required by the act of 1891. The suit, without injunction, did not restrict defendants' entire freedom of action. Nor did the suit in any way increase defendants' risks through construction. On the contrary, if no suit had been brought, defendants would have been subject in the midst of their work or even after its completion to the same attack that was made upon their project by this case. With or without suit, defendants' enterprise would have had to meet the peril of its being found unlawful. The suit, instead of being unjust, gave defendants fair and timely

warning of the Government's attitude. They could better complain if the Government had allowed them to go on with their works without immediate assertion of the Government's claims. If no suit had been brought, defendants then might fairly claim that they had been misled by apparent acquiescence of the United States. The suit was fair warning. Defendants, like the rest of the world, had to assume the risk of the legality of their enterprise.

VI.

Both the pivotal points in this case, viz, the allowance of the filing of the supplemental bill and the denial of appellants' motion of October 31 to open their default, were matters of discretion, and therefore are reviewable in this court only in case of plain abuse of discretion.

The cases showing that leave to file a supplemental bill is discretionary have already been cited (p. 14, *ante*).

In the same place are cited some of the many decisions of this court that, in general, the allowance or refusal of leave to file a new plea or to amend a pleading is discretionary.

Likewise it is matter of discretion with the trial court whether or not to open a default.

Brockett v. *Brockett*, 2 How., 238.
Dean v. *Mason*, 20 How., 198, 204.
United States v. *Estudillo*, 1 Wall., 710, 716.
Connor v. *Peugh*, 18 How., 394.
McAllister v. *Kuhn*, 96 U. S., 87.

The judgment below should be affirmed.

LLOYD W. BOWERS,
Solicitor-General.

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RIO GRANDE DAM AND IRRIGATION COMPANY *v.* UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 49. Argued December 3, 1909.—Decided December 13, 1909.

Where a case is opened that further evidence may be produced, it is also open for the amendment of the original pleadings or for additional pleadings appropriate to the issues; and permission by the lower court to file such supplemental complaint is not inconsistent with the mandate of this court remanding the case with directions to grant leave to both sides to adduce further evidence.

Under the provisions of the Code of New Mexico allowing supplemental pleadings alleging facts material to the issue, the fact that the defendant corporation has, since the suit was brought by the Government to enjoin it from so building a dam as to interfere with the navigability of an international river, failed to exercise its franchise in accordance with the statute, is germane to the object of the suit and may be pleaded by supplemental complaint.

The allowance of amendments of supplemental pleadings must at every stage of the cause rest with the discretion of the court, which discretion must depend largely on the special circumstances of each case, nor will the exercise of this discretion be reviewed in the absence of gross abuse.

Attorneys of record are supposed to be present during the terms of the court in which their causes are pending, and are chargeable with notice of proceedings transpiring in open court.

In this case the action of the trial court in taking a supplemental complaint for confessed in the absence of any pleading after the time therefor had elapsed, sustained, there appearing to be no excuse for the default and no irregularity appearing in the order permitting the filing of the complaint or in the service thereof.

The fact that for a time work was enjoined at the instance of the Government does not excuse the delay in completing work under statutory permission within the time prescribed where the delay exceeds the limit after deducting all the time for which the injunction was in force.

13 New Mexico, 386, affirmed.

THE general object of this suit—which was brought by the United States in one of the courts of New Mexico on the twenty-fourth day of May, 1897—was to obtain an injunction to prevent the Rio Grande Dam and Irrigation Company from constructing and maintaining a dam across, and a reservoir over and near, the Rio Grande River at a certain point in that Territory. In the court of original jurisdiction the suit was dismissed and the dismissal was affirmed by the Supreme Court of the Territory; but that judgment was reversed by this court, with instructions to set aside the decree of dismissal and to inquire whether the intended acts of the defendants in the construction of a dam and appropriating the waters of the Rio Grande would substantially diminish the navigability of that stream within the limits of present navigability; and, if so, to enter a decree restraining those acts to the extent that they would so diminish. *United States* v. *Rio Grande Irrigation Company*, 174 U. S. 690, 708, 710. The mandate of this court to that effect was executed by the Supreme Court of the Territory, and the cause went back to the court of original

jurisdiction with directions to proceed in accordance with that mandate.

The cause was again heard in the court of original jurisdiction, that court, denying a motion, in behalf of the United States, for a continuance in order that it might more fully prepare its case. The suit, on final hearing, was again dismissed, and that judgment was sustained by the Supreme Court of the Territory. But this court reversed the decree of the latter court and remanded the cause with instructions to reverse the decree of the court of original jurisdiction, and with directions "to grant leave to both sides to adduce further evidence." *United States* v. *Rio Grande Dam & Irrigation Co.*, 184 U. S. 416, 424, 425. The mandate of this court to the above effect was executed, and the case was again placed on the docket of the court of original jurisdiction.

For a full statement of the issues and facts up to this point in the litigation reference is made to the opinions of this court as reported in 174 U. S. 690, and 184 U. S. 416.

The record shows that on the seventh day of April, 1903—after the last decision in this court—the United States, by leave of the court of original jurisdiction, filed a *supplemental* complaint, which set forth the then status of the case. That complaint referred to the defendant's plea, stating that it had complied with the requirements of the act of Congress approved March 3d, 1891, repealing timber culture laws and for other purposes, 26 Stat. 1095, 1102, c. 561, §§ 20, 21, and "had acquired a right to construct said dam and divert said water by reason of compliance with the terms of said Act." It then proceeded: "II. Plaintiff further alleges that defendant's plea above referred to, claiming a right to construct said dam under the said act of Congress, approved March 3d, 1891, c. 561, was filed on June 26, A. D. 1897, and that its articles of incorporation and proof of its incorporation, and the map and survey of its reservoir had been filed and approved by the Secretary of the Interior long prior to the filing of said plea, as appears from an inspection of said plea itself. III. Plaintiff

further alleges that in and by section twenty of the said act of March 3d, 1891, above referred to, it was provided 'that if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch or reservoir, to the extent that the same is not completed at the date of the forfeiture,' and that although five years since the filing and approval of said articles of incorporation, proofs of organization, maps and surveys have long since elapsed, defendant has not complied with the requirements of said act, but has failed to construct or complete within the period of five years after the location of said canal and reservoir any part or section of the same, and the same has by reason thereof become forfeited. IV. Plaintiff further alleges that during all of said time, except from May 24th, 1897, to ——— 1897, the date when the temporary injunction was dissolved, the said defendants have been in no wise hindered, restrained or prevented from complying with the provisions of said act by any judicial order or process whatsoever. V. Wherefore, plaintiff prays to be permitted to file this supplemental bill of complaint, and that the same be considered upon the hearing of this cause, and that the defendants be decreed to have forfeited all the rights they may have had, or claimed under and by virtue of said act of March 3d, 1891, not hereby admitting, however, that the defendants ever acquired any rights under and by virtue of said act. Plaintiff further prays that the injunction, and all other relief prayed for in and by said amended bill of complaint, be granted, and that said injunction be made perpetual, and that it have and recover its costs expended in this cause, and thus plaintiff will ever pray."

A copy of this supplemental complaint was served on the attorney of the defendants on the day (April 7th, 1903) it was filed. More than forty days thereafter, on the twenty-first day of May, 1903, a decree was entered finding the allegations of the supplemental complaint—no demurrer, answer or other

pleading having been filed thereto—"are confessed and are true." The court further found "that the articles of incorporation and the map, survey of the reservoir of the defendant corporation, the Rio Grande Dam and Irrigation Company, were filed with the Secretary of the Interior prior to the twenty-sixth day of June, A. D. 1897, and were, prior to said date, approved by the Secretary of the Interior; and it further finds that the said defendants have not completed its said reservoir or said ditch, or any section thereof, within five years after the location of the said reservoir and its said ditch line, or within five years after the approval of the same by the Secretary of the Interior; and the court further finds that five years since the filing and approval of the said articles of incorporation, proof of organization, maps and surveys of the said reservoir and ditch line of the defendants had long since elapsed prior to the filing of the said supplemental bill and that the defendants had not complied with the requirements of the act of Congress, approved March 3, 1901, under which the same were filed, but have failed to construct or complete within the period of five years after the location of the said canal and reservoir any part or section of the same." And it was adjudged "that the rights of the said defendants, or either of them, to so construct and complete the said reservoir and said ditch, or any part thereof, under and by virtue of the said act of Congress of March 3, 1901, be and the same are hereby declared to be forfeited. It is further ordered, adjudged and decreed by the court by reason of the premises that an injunction be, and the same is hereby granted against the said defendants, enjoining them from constructing or attempting to construct the said reservoir, or any part thereof, and that the same be made perpetual." (By an amended decree filed October 5th, 1903, and entered *nunc pro tunc* as of May 21st, 1903, the date given as March 3d, 1901, in the decree was made to read March 3d, 1891, in order to conform to the actual date of the act of Congress intended to be referred to both by the United States and by the court.)

A statute of New Mexico, in force at the time and before the above decree was rendered, provided: "Every pleading, subsequent to the complaint, shall be filed and served within twenty days after service of the pleading to which it is an answer, demurrer, or reply." Compiled Laws of New Mexico, 1907, Title 33; Code of Civil Procedure, c. 1, art. 4, sub. sec. 46.

On the thirty-first of October, 1903, the defendants moved the court to vacate the order allowing the supplemental bill to be filed, and that they be permitted to come in and answer the supplemental bill. This motion was denied and upon appeal to the Supreme Court of the Territory the action of the trial court on this point was sustained. The former court, at the same time, March 2d, 1906, adjudged that the right of the defendants, or either of them, to construct and complete its reservoir and ditch, or any part thereof, within the time required by the act of Congress of March 3d, 1901, was forfeited. It was also adjudged that the defendants be enjoined from constructing, or attempting to construct, the said reservoir or any part thereof. The injunction was made perpetual. From that judgment the present appeal was prosecuted.

Mr. William W. Bride and *Mr. Frederick S. Tyler*, with whom *Mr. Charles A. Douglas* was on the brief, for plaintiffs in error:

The lower court erred in permitting a supplemental complaint to be filed. This court has many times frowned upon such acts. *Southard* v. *Russell*, 16 How. 547; *Ex parte Dubuque*, 1 Wall. 69; *Ames* v. *Kimberly*, 136 U. S. 629; *Re Gamewell Co.*, 73 Fed. Rep. 908; *West* v. *Brashear*, 14 Pet. 51; *Mason* v. *Harpers Ferry*, 20 West Va. 223; *Boggs* v. *Willard*, 70 Illinois, 315; *Rees* v. *McDaniels*, 131 Missouri, 681; *Cage* v. *Bailey*, 119 Illinois, 539; *Choteau* v. *Allen*, 114 Missouri, 56; *Mackall* v. *Richards*, 116 U. S. 47; *Re Sandford Tool Co.*, 160 U. S. 255; *Sibbald* v. *United States*, 12 Pet. 488; *Tex. & Pac. Ry.* v. *Anderson*, 149 U. S. 237.

The direction to allow further proof was specific and the

court below varied that direction—and this can be corrected by mandamus or appeal. *United States* v. *Fossatt*, 21 How. 445; *Re Sandford Tool Co.*, 160 U. S. 255. The supplemental bill was improperly so called; it was not, nor was its purpose, related to the original bill but it set up independent cause of action. This is not permissible. *Accumulator Co.* v. *Electric Co.*, 44 Fed. Rep. 602, 607; 2 Street's Fed. Eq. Prac., §§ 1170, 1171; 1 Foster's Fed. Prac., 4th ed., 631; *Trust Co.* v. *Street Railway*, 74 Fed. Rep. 67; *Putney* v. *Whitmire*, 66 Fed. Rep. 385; *Stafford* v. *Howlett*, 1 Paige (N. Y.), 200; Vansile's Eq. Plead., § 263; *Milner* v. *Milner*, 2 Edw. Ch. (N. Y.) 114; *Higginson* v. *C., B. & Q. R. R.*, 102 Fed. Rep. 197; Fletcher's Eq. Plead. 892.

The supplemental bill must be germane to the original bill, and if the original bill shows no ground for relief it cannot be aided by a supplemental bill setting up matters that have since arisen. *Minnesota Co.* v. *St. Paul Co.*, 6 Wall. 742; Story Eq. Plead., § 339; *Hughes* v. *Carue*, 135 Illinois, 519; *Maynard* v. *Green*, 30 Fed. Rep. 643; *Prouty* v. *Lake Shore Ry.*, 85 N. Y. 275; *Snead* v. *McCoull*, 12 How. 407.

The notice was insufficient. Equity Rule 57, and cases cited in Desty's Rules, 7th ed., p. 110.

The Solicitor General for the United States, appellee:

The trial court properly allowed complainant's supplemental bill to be filed. Nothing in the previous decisions of this court was incompatible with the filing of the supplemental bill or with the subsequent proceedings upon it. Allowance of the filing of a supplemental bill is within the discretion of the trial court. *Berliner Gramophone Co.* v. *Seaman*, 113 Fed. Rep. 750, 754; *Jacob* v. *Lorenz*, 98 California, 332, 337; *Farmers' Loan & Trust Co.* v. *Bankers' & Merchants' Telegraph Co.*, 109 N. Y. 342. And, in general, granting or refusing leave to file a new plea, or to amend a pleading, is discretionary and is not reviewable on appeal except for gross abuse of discretion. *Mandeville* v. *Wilson*, 5 Cranch, 15, 17;

Gormley v. *Bunyan*, 138 U. S. 623; *Chapman* v. *Barney*, 129 U. S. 677; *Walden* v. *Craig*, 9 Wheat. 576; *Chirac* v. *Reinicker*, 11 Wheat. 280; *Ex parte Bradstreet*, 7 Pet. 634.

Notice of complainant's application for leave to file its supplemental bill was served upon the defendants' attorney; and no evidence to the contrary is found in the record. But the omission of notice would not be material error, because a copy of the bill was at once served upon the attorney for defendants and they had full opportunity thereupon to move to strike it off the file or demur. As defendants failed in any way to attack the filing of the bill or to demur or plead in any way to it within the time allowed by § 2685, New Mexico Code of Civil Procedure, it was the duty of the trial court to take the bill *pro confesso* and to enter the decree.

Notice of an application for leave to file a supplemental bill is not in all cases necessary. It is a matter of discretion with the court whether to require such notice. *Eager* v. *Price*, 2 Paige Ch. 333, 335; *Lawrence* v. *Bolton*, 3 Paige, 294, 295; *Barriclo* v. *Trenton Mut. Life & Fire Ins. Co.*, 13 N. J. Eq. 154, 155; *Winn & Ross* v. *Albert et al.*, 2 Md. Ch. 42; *Taylor* v. *Taylor*, 1 Mac. & G. 397.

Whether or not a bill is not supplemental in character, is waived by failure to demur, plead or object thereto within the time allowed. The proper method of objecting on the ground of want of supplemental matter is by demurrer. 2 Daniell Ch. Pl. & Pr., 6th Am. ed., p. 1535; *Bowyer* v. *Bright*, 13 Price, 316; *Stafford* v. *Howlett*, 1 Paige Ch. 200.

The supplemental bill does not set up matter foreign to the original case in alleging forfeiture of defendants' rights in their dam and reservoir sites. Forfeiture could not be claimed in the original bill because it was not true when the bill was filed. It is certainly proper to add the claim of forfeiture to the original bill when the cause of forfeiture occurred after the suit was begun. Matter may be introduced by supplemental bill which could have been added to the original bill if then available. *Winn & Ross* v. *Albert et al.*, 2 Md. Ch. 42, 48;

Hardin v. *Boyd*, 113 U. S. 756. As to scope allowable to a supplemental bill, see *Jones* v. *Jones*, 3 Atk. 110; *Eager* v. *Price*, 2 Paige, 333; *Saunders* v. *Frost*, 5 Pick. 275; *Fisher* v. *Holden*, 84 Michigan, 494; *Jacob* v. *Lorenz*, 98 California, 332; *Hasbrouck* v. *Shuster*, 4 Barb. 285; *Candler* v. *Pettit*, 1 Paige Ch. 168; *Winn & Ross* v. *Albert et al.*, 2 Md. Ch. 42; *Mutter* v. *Chauvel*, 5 Russ. 42; *Reeve* v. *North Carolina Land & Timber Co.*, 141 Fed. Rep. 821; *Jenkins* v. *Int. Nat. Bank*, 127 U. S. 484.

The rule that a bad title set up in the original bill cannot be aided by supplemental bill setting up a new and distinct title obtains only when complainant's original title is wholly bad; it does not prevent the assertion of a new title when it adds to or supplements the first title, instead of contradicting it. *Winn & Ross* v. *Albert*, *supra*. And see *Jacques* v. *Hall*, 3 Gray, 194, 197; *Candler* v. *Pettit*, 1 Paige, 168; *Edgar* v. *Clevenger*, 3 N. J. Eq. 258; *Lowry* v. *Harris*, 12 Minnesota, 255, 266; *Reeve* v. *Timber Co.*, 141 Fed. Rep. 821, 834. There is no inconsistency between the supplemental and original bills in this case. The purpose of each was to restrain defendants' construction and use of the proposed dam and reservoir.

Even if the supplemental bill had been improperly allowed to be filed, it was right to deny defendants' motion to vacate the allowance of the filing of the bill and the decree that had been entered or to open defendants' default and permit them to plead. Defendants' inaction and laches deprived them of any claim to relief; their motion was too late under the New Mexico statute; the supplemental character of complainant's bill was not questionable by motion but only by demurrer; and the answer which defendants asked leave to interpose failed itself to show any defense against default.

MR. JUSTICE HARLAN, after making the foregoing statement, delivered the opinion of the court.

We perceive no error in the judgment now under review.

The main contention of the defendants is that it was error to permit the United States to file its supplemental bill. We do not accept this view of the trial court's duty. When the cause was last here the court expressed the conviction that if the case was finally disposed of on the record as it then was great wrong might be done to the United States and to all interested in preserving the navigability of the Rio Grande. Hence, the cause was sent back that each side might adduce further evidence, if they had any to adduce. When the Government asked to file its supplemental bill the suit was of course reinstated on the docket of the court of original jurisdiction for such action as might be proper or necessary. The case having been opened that further evidence might be produced, it was certainly open for an amendment of the original pleadings or for such additional pleadings as might be appropriate to the issues between the parties. The parties were not limited to the production merely of evidence. The defendants, in the discretion of the court, could have been allowed, upon a proper showing and before taking further proof, to amend their pleadings, and equally the Government, before taking further proof, could have been allowed to file a supplemental complaint. *Marine Ins. Co.* v. *Hodgson*, 6 Cranch, 206, 218. Besides, subsection 87 of the New Mexico Civil Code would seem to be broad enough to cover the question of power. It provides: "A party may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the cause, or praying for any other or different relief, order or judgment." The facts set forth in the supplemental complaint were manifestly not foreign to the Government's original cause of action. In every substantial sense those facts were material. Strictly speaking, they may have constituted new matter, but they did not present a new cause of action. *Jenkins* v. *International Bank of Chicago*, 127 U. S. 484. They grew out of and were connected with the same transaction from which this litigation arose, and were germane to the object of the suit. That object was to restrain the defendants

from constructing and maintaining dams, reservoirs, canals or ditches that would obstruct the navigable portion of the Rio Grande River. If all the grounds of relief set out in the supplemental complaint did not exist when the original complaint was filed, they were alleged to exist when the supplemental complaint was tendered, and being connected with the original cause of action it was right to bring them, in proper form, to the attention of the court when determining whether the Government was entitled to the relief it asked. So the Supreme Court of the Territory held, and so we hold. There was, plainly, no abuse of discretion or of the established rules of practice in permitting the supplemental complaint to be filed. The allowance of amendments of equity pleadings must "at every stage of the cause, rest in the discretion of the court; and that discretion must depend largely on the special circumstances of each case." *Hardin* v. *Boyd*, 113 U. S. 756, 761.

Upon the question of the diligence or want of diligence of the parties, it may be said that the supplemental complaint was tendered at a time when the court was open; the leave to file was given in open court; and the defendant's attorney was served with a copy of that complaint on the very day it was tendered and filed. On this part of the case the Supreme Court of the Territory said that attorneys of record are presumed to be present during terms of the court in which their causes are pending, and in contemplation of law were chargeable with notice of all proceedings transpiring in open court in respect of such causes; also, that "under the facts of this case, counsel are presumed to have been present, and to have such notice as the law requires of matters transpiring in open court on the day on which leave was granted to file the supplemental complaint, and the same was filed and served upon them. *Younge* v. *Broxson*, 23 Alabama, 684; *Sanders* v. *Savage*, 63 S. D. 218. The court was vested with discretion by the last clause of sec. 104, *supra*, [Code of Civil Procedure, as amended by c. 11 of Laws of 1901] which does not seem to have been abused, nor was there any abuse of the general dis-

cretion to allow an amended or supplemental bill in equity conferred upon the courts of the United States, as may be seen by reference to the case of *Berliner Gramophone Co.* v. *Seamon*, 113 Fed. Rep. 750, in which it was held that, 'the granting of leave to file an amended and supplemental bill is a matter within the discretion of the court, and its action will not be reviewed in an appellate court unless there has been a gross abuse of this discretion.'"

The objection that the trial court erred in taking the supplemental complaint for confessed cannot be sustained. That objection was thus properly disposed of by the Supreme Court of the Territory: "There being no error or irregularity in the court's order allowing the supplemental complaint to be filed, the same having been done in open court, and a copy of the same having been served upon one of the attorneys of record on the same day on which it was filed, the statute required an answer or other proper pleading to be filed within twenty days from the date of such filing, and in the event of failure to plead, or secure additional time to plead, neither of which were done in this case, it was perfectly regular for the court to render decree. *Gregory* v. *Pike*, 29 Fed. Rep. 588. Appellants seek to be relieved from their own default by alleging neglect on the part of their attorneys. . . . There being service of a copy of the supplemental complaint upon one of the attorneys of record on the day on which it was filed it was entirely regular for the court to render the decree when applied for 44 days after such service, in the absence of any appearance or pleading by the appellants."

Some stress is laid on the fact that the Government obtained an injunction to prevent the defendants from constructing its reservoir and dam. That fact, it is contended, estops the Government from relying on the five-years' limitation prescribed by the above act of March 3d, **1891,** c. 561. But this view is without merit. The preliminary injunction referred to was dissolved July 31st, 1897, and was never reinstated. The supplemental bill was taken as confessed on

May 21st, 1903, and a perpetual injunction was then awarded against the defendants. So that between the dissolution of the preliminary injunction and the granting of the perpetual injunction more than five years elapsed, during which the defendants were not impeded or hindered by any injunction against them. This is sufficient to show that the point just stated is without merit. We need not, therefore, consider the larger question, whether the five-years' limitation prescribed by Congress in the above act of March 3d, 1891, could have been disregarded or enlarged either by the action or nonaction of the parties or by any order of injunction made by the court in the progress of the cause.

There are some minor questions in the case, but they are not of substance and need not be noticed. We perceive no error of law in the record, and the judgment is

Affirmed.

MR. JUSTICE MCKENNA did not participate in the consideration or determination of this case.